IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-454

INTERNATIONAL TERMINAL OPERATING CO., INC.,
Petitioner,

v.

CARMELO BLUNDO

AND

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,
Respondents.

On Writ of Certiorari to the United States Court of Appeals
for the Second Circuit

BRIEF FOR THE PETITIONER

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OPINIONS BELOW

This matter arises under the Longshoremen's and Harbor Workers' Compensation Act, as amended in 1972. The Decision and Order of the Administrative Law Judge, and the Order amending the Previously Issued Decision and Order, were entered on March 3, 1975, and April 18,

1975, respectively, and appear at pages 49a and 60a as Appendices C and D to the Petition. (All page citations to the Appendices to the Petition are hereinafter preceded by the designation "Pet. A.") The Decision of the Benefits Review Board of the Department of Labor affirming the Decision and Order of the Administrative Law Judge and dated October 30, 1975, appears as Appendix B to the Petition (Pet. A. 45a). The majority and dissenting opinions and judgment of the Second Circuit Court of Appeals, decided July 1, 1976, affirming the Decision of the Benefits Review Board, have not been officially reported but are printed as Appendix A to the Petition. (Pet. A. 1a).

JURISDICTION

The judgment of the Second Circuit Court of Appeals was entered on July 1, 1976 (Pet. A. 1a). The Petition for a Writ of Certiorari was filed on September 28, 1976, and was granted on December 6, 1976. This case has been consolidated for review with *Northeast Marine Terminal Co. et al.* v. *Caputo et al.*, No. 76-444, as to which the Petition for a Writ of Certiorari was also granted on December 6, 1976. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act were intended to extend federal compensation coverage to new categories of persons not directly involved in the activity of unloading cargo from a vessel to an adjacent pier or similar facility.

2. Whether the 1972 amendments to such Act were intended to extend coverage to a "stripper" of containers who was not employed by the unloader of the vessel, who was located at the time of injury in a building sub-

stantially removed from the unloading area and never used for loading or unloading of vessels, and whose sole duty at the time of the injury was to break down the container for storage and Customs inspection—particularly where a substantial period of time had passed since the container had been unloaded at some other location.

3. Whether the situs of the accident in this case and the status of the injured employee were such as to meet the requirements of the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act.

STATUTE INVOLVED

The relevant portions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, are as follows:

Section 2(3), 86 Stat. 1251, 33 U.S.C. § 902(3):

> The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

Section 2(4), 86 Stat. 1251, 33 U.S.C. § 902(4):

> The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

Section 3(a), 86 Stat. 1251, 33 U.S.C. § 903(a):

> Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel). * * *

STATEMENT

Petitioner International Terminal Operating Company ("ITO") conducts two distinct types of operations in the New York area. One is stevedoring—the loading or unloading of cargo from ships. That operation by ITO is not involved in this case. The other activity is as a terminal operator, including, under contract with other companies, the consolidation or breaking down of cargo which has been or will be shipped on the lines of other carriers. That is the activity involved here.

On January 8, 1974, one of ITO's employees, respondent Blundo, was injured while working as a "checker" in a warehouse at a pier at 19th Street in Brooklyn (A. 63-64, 68-70).[1] The area where he was working was a large one. The pier runs approximately 1000 feet from 19th to 21st Streets and extends approximately 700 feet from the foot of these streets to the seaward edge of the area (A. 62-63).[2] Cargo is loaded and unloaded from vessels at the seaward edge of the 21st Street pier, but never at the 19th Street pier (A. 63-64, 75-76, 95-96; Pet. A. 31a n.19). Nor was the cargo involved in this case unloaded at either the 19th or 21st Street piers.

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[1] The designation "A." refers to the consolidated Appendix filed herein and in No. 76-444.

[2] The area is fenced and has two gates (A. 61).

Instead, sometime prior to Mr. Blundo's accident, the particular container at issue[3] had been unloaded from some ship at some destination quite distant from the 19th Street pier. Although no one involved in the accident knew how long ago the container had been unloaded, there was testimony that it could take a week or considerably longer for such containers to reach the 19th Street pier after being unloaded in other sections of New York (A. 81-83, 86-87, 96). No one involved in the accident knew the name of the ship which had carried the container or which company had unloaded it (A. 81, 96). It is clear, however, that the unloader had not been ITO (A. 71, 76, 77, 85-86, 95-96, 104-05).

After the container had been unloaded, it had been carried with other cargo over the public streets to the 19th Street pier by a common carrier trucking company, driven by Teamsters Union members (A. 76-77, 95-96). Sometimes, after delivery at 19th Street, cargo is picked up directly by the consignee, using his own trucks (A. 97-98). In this instance, however, since duty was owed on this particular container, it had to be "stripped," or broken down, and sent to a bonded warehouse located on the pier for passage by Customs officials before being picked up by the consignee or consignees (A. 69, 107-08, 110, 122). This stripping was being performed by ITO under contract with American Export Lines, Inc., which owned the container (A. 65, 76, 85-86, 120-21).

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[3] A container is a large metal box into which smaller crates, boxes, bags, barrels or other such packages are consolidated for shipment to a single destination, even though the various contents may be meant for multiple consignees. Ordinarily containers are shipped on vessels specifically designed for carrying containers, and loaded or unloaded at special container facilities. After being taken off a vessel by crane, a container is placed on a truck chassis and thereby conveyed to a trailer which may be thereafter transported within the unloading terminal or over public streets to a consignee or warehouse.

As a "checker," Mr. Blundo's job on the day of his injury [4] was to break the seal around the container, check the contents against his manifest sheet (which showed a description of the cargo, the consignee, etc.), and to mark each item as "stripped" (A. 86-89). These duties are performed in a building used exclusively for storage and stripping and not in an area used for the loading or unloading of ships (A. 85-86, 94-95; Pet. A. 31a n.19). After the checking, the cargo is then placed on pallets and sent to the bonded warehouse until cleared by Customs and picked up by the consignee or consignees (A. 88, 98). It was while Mr. Blundo was engaged in the checking process in the warehouse that he slipped on some ice and was injured (A. 74).

Under the Longshoremen's and Harbor Workers' Compensation Act, as amended in 1972, employees who are not covered by the Act are paid under state workmen's compensation laws. In order for an employee to be covered by the federal statute, several criteria must be met. Thus, the employee must meet the "status" test as someone engaged in maritime employment, as defined in Section 2(3), and the injury must meet the "situs" test as having occurred upon navigable waters, as defined in Section 3(a).[5]

The Administrative Law Judge and the Benefits Review Board, both of the Department of Labor, held that Mr. Blundo was engaged in maritime employment at the time of his injury and was thus an "employee" as defined by the Act, and that the place of the injury was "upon the navigable waters of the United States" as

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[4] Blundo testified that on other occasions he spent as much as 20% of his time performing on-vessel checking duties (A. 67-68).

[5] The employer must also meet the test set forth in Section 2(4). However, in this case, petitioner has never questioned that it was an "employer" under the Act, since some of its other employees were engaged in longshoring operations (*See* Pet. A. 54a).

that term is defined in the 1972 amendments to the Act (Pet. A. 57a, 46a).

These findings were made despite the facts, as set forth above, that:

(a) ITO did not unload the ship.

(b) The unloading was done in an area substantially removed from the scene of the accident.

(c) The container at issue was subsequently carried over the city streets by common carrier.

(d) It might have been a week or longer before the container reached the 19th Street pier after being unloaded from its vessel.

(e) The container was not owned by ITO.

(f) The container was "stripped" in a building not used for loading or unloading ships.

(g) ITO does not load or unload ships at the 19th Street pier.

(h) The injured party's sole duties revolved about checking the contents of the container.

(i) The only step that remained was for the cargo to be passed by Customs officials and picked up by a consignee or consignees.

The Second Circuit split two to one in regard to respondent Blundo. Judges Friendly and Oakes held that Blundo's injury met the "situs" test of the 1972 amendments (Pet. A. 30a n. 19), and that he was covered by the Act because he had stripped the container prior to the point where the consignee had begun its movement from the pier (Pet. A. 39a).

Judge Lumbard dissented as to Blundo. He would have held that the 1972 amendments were meant to extend only to those employees engaged in loading or unloading activities between the vessel and the first point

of rest if the cargo is being unloaded from the vessel, or the last point of rest if the cargo is being loaded aboard the vessel (Pet. A. 42a-43a).

Faced with similar factual situations raising the issue of the new extent of coverage under the 1972 amendments to the Act, other Courts of Appeals have arrived at dissimilar legal solutions.[6] The opinions of these Courts of Appeals and of individual judges thereof are summarized and discussed in some detail in the Petitions for Writs of Certiorari filed herein (pp. 8-24) and in *John T. Clark & Son* v. *Stockman, supra* (pp. 7-12).

SUMMARY OF ARGUMENT

The 1972 coverage amendments to the Act substantially broadened the Act's reach by including, in addition to those longshoremen actually working aboard ship, all other members of the longshore loading or unloading gang and other employees directly involved in the loading or unloading function. In enacting the 1972 coverage amendments, however, Congress did not intend to cover whole new categories of persons engaged in activities not formerly covered, even in part, by the pre-1972 Act. Specifically, Congress did not intend to include all of the large numbers of persons at United States ports who participate in waterfront freight-handling up to and including the point of delivery to the consignee.

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[6] *See Stockman* v. *John T. Clark & Son*, 539 F.2d 264 (1st Cir. 1976) (Pet. A. 62a), *petition for cert. filed* Oct. 22, 1976, (No. 76-571); *Sea-Land Service, Inc.* v. *Director, Office of Workers' Compensation Programs*, 540 F.2d 629 (3d Cir. 1976) (Pet. A. 90a); *I.T.O. Corp.* v. *Benefits Review Board*, 529 F.2d 1080 (4th Cir. 1975), *on rehearing in banc*, —— F.2d —— (August 26, 1976) (Pet. A. 113a), *petition for cert. filed sub nom. Maritime Terminals, Inc.* v. *Brown*, Nov. 19, 1976 (No. 76-706) and *Adkins* v. *I.T.O. Corp.*, Nov. 24, 1976 (No. 76-730); *Jacksonville Shipyards, Inc.* v. *Perdue*, 539 F.2d 533 (5th Cir. 1976), *petition for cert. filed sub nom. Pfeiffer* v. *Ford*, 45 U.S.L.W. 3391, Nov. 10, 1976 (No. 76-641); *Weyerhaeuser Co.* v. *Gilmore*, 528 F.2d 957 (9th Cir. 1975), *cert. denied*, 45 U.S.L.W. 3254 (Oct. 5, 1976).

The Act, the legislative history of the 1972 coverage amendments, consistent industry practice, and consistent judicial and other official definitions of the longshoring function all point to the conclusion that the "maritime employment" of longshoremen is the stevedoring activity of the longshore gang (and those directly involved with the gang) which, in the case of unloading, takes cargo out of the hold of a vessel, moves it away from the ship's side, and carries it to its point of rest on the pier or in a terminal shed. It is at this point of rest that the stevedoring function ends and the terminal operation or warehousing function begins.

Respondent Blundo's activity at the time of his injury was in conjunction with terminal operation, and would not have been covered even in part by the pre-1972 Act. Blundo was not a longshoreman or a member of a longshore gang, and did not take part in the unloading of the cargo from the vessel. The unloading was done by a longshore gang employed by another stevedoring firm not Blundo's employer, and was completed at a time and place far removed from the time and place of Blundo's injury. In fact, Blundo's injury occurred at a pier which was never used for loading or unloading vessels and which therefore did not meet the "situs" requirement of the Act.

The interpretation of the Act advanced herein accurately identifies the employment activity or function which Congress intended to reach through the 1972 coverage amendments. Moreover, this interpretation is consistent with those principles of certainty and geographical uniformity of application which have been important considerations in the construction of the Act since it was first enacted in 1927. The concept of "loading" and "unloading" described herein is familiar not only to employees and employers in the industry, but also to federal courts which will ultimately be responsible for implementing this Court's definition of coverage.

By contrast, the Department of Labor's expansive interpretation of coverage under the amended Act leads to arbitrary and anomalous results in particular cases which Congress could not have intended when it enacted the 1972 amendments. Moreover, in view of the legislative history of the 1972 amendments, Congress cannot be presumed to have approved an extension of coverage which would have led to such huge increases in compensation insurance costs within the stevedore and marine terminal industry, and such severe economic effects on harbor operations, as have in fact occurred.

ARGUMENT

I. Blundo was not a covered "employee" under the Act.

A. *The 1972 amendments to the Act did not extend coverage to new categories of employees not directly involved in the loading or unloading of vessels.*

Until 1972, coverage under the Act was determined largely by the "situs" of the injury and the "status" of the injured person's employer. If the employer was a "maritime" employer (*i.e.*, if he had any employees engaged in "maritime employment"), and if the injury occurred on the navigable waters of the United States, then the injury was covered unless the injured person came under one of the specific exclusions of the Act.[7]

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[7] The relevant provisions of the Act before the 1972 amendments were as follows:

Section 2(3), 44 Stat. 1424, 33 U.S.C. § 902(3):

> The term "employee" does not include a master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

Section 2(4), 44 Stat. 1424, 33 U.S.C. § 902(4):

> The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in

The employment "status" or function of the injured persons was irrelevant to the coverage issue, except that "a master or member of a crew of any vessel, [and] any person engaged by the master to load or unload or repair any small vessel under eighteen tons net," were expressly excluded from the definition of "employee" in Section 2(3).

Until 1972, the strict situs orientation of the Act resulted in the extension of only partial coverage to certain occupations which, although unquestionably maritime in nature, were amphibious in operation. Foremost among such occupations was that of the longshoreman engaged in loading or unloading a vessel, an activity which typically requires movement back and forth repeatedly across the jurisdictional line which separated the shore from navigable waters.

The 1972 amendments to the Act modified the tests for coverage in two respects. First, the "situs" provision was expanded to cover injuries incurred in certain shoreside areas as well as on navigable waters.[8] Second, the definition of a covered employee was amended to add an express "status" requirement. Under the Act as amended, a person injured at or on a covered situs must also, in order to be eligible for compensation, show that he is a person engaged in maritime employment, *i.e.*, that he is a "longshoreman or other person engaged in longshoring

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part, upon the navigable waters of the United States (including any dry dock).

Section 3(a), 44 Stat. 1426, 33 U.S.C. § 903(a):

> Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) * * *.

[8] The new Section 3(a) enlarged the term "navigable waters" to include "any adjoining pier, wharf, drydock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel."

operations."[9] Blundo was injured over one year after the effective date of the 1972 amendments. Thus, the first issue in this case is whether Blundo was engaged in "maritime employment" at the time of his injury.

Two basic principles, each plainly reflected in the legislative history of the 1972 amendments, govern the resolution of this issue. First, in enacting the 1972 amendments Congress did not intend to extend the coverage of the Act to new categories of employment not previously covered. Second, the occupational function to which Congress intended to extend full federal coverage through the 1972 amendments was the function of loading or unloading cargo from vessels.

1. *The 1972 amendments did not extend coverage to new categories of "maritime employment."*

The anomaly which Congress sought to correct through the 1972 amendments to the Act's coverage provisions is illustrated by the result reached in *Nacirema Operating Co.* v. *Johnson*, 396 U.S. 212 (1969). In that case longshoremen engaged in loading a vessel were held to be outside the coverage of the Act because their injuries occurred ashore. The effect of this holding was to subject the "amphibious" longshoreman[10] to a dual existence for compensation purposes, with the water's edge serving as a sharp dividing line between state benefits ashore and federal benefits aboard ship. A typical longshore loading or unloading gang, the members of which crossed that dividing line perhaps dozens of times a day in the course of taking cargo on or off a vessel, was subject to a continuously shifting mix of federal and state cover-

[9] Section 902(3). The "status" requirement also embraces categories of "harborworker[s]" not relevant to this case, *i.e.*, "* * * a ship repairman, shipbuilder, and shipbreaker * * *."

[10] The "amphibious nature of the longshoreman's occupation" was recognized in *Victory Carriers, Inc.* v. *Law*, 404 U.S. 202, 213 (1971).

age, depending solely on the seemingly unimportant and fortuitous circumstance of where the various gang members were standing at a given point in time.

An analogous result was reached in *Victory Carriers, Inc.* v. *Law*, *supra*, which set definite limits on the ability of longshoremen injured ashore by pier-based equipment to pursue the federal "seaworthiness" remedy against the owner of a vessel being loaded or unloaded. Although *Victory Carriers* did not involve the workmen's compensation provisions of the Act, this Court's decision in the case was similar in effect to the decision in *Nacirema*, since both decisions confined federal jurisidiction to injuries incurred on navigable waters, except where, in the "seaworthiness" case, the injury was caused by an appurtenance of a vessel. Taken together, these two decisions had the practical effect of making state workmen's compensation laws the exclusive remedy for longshore injuries incurred ashore. On navigable waters, however, the longshoreman's remedies remained exclusively federal.

The complexity and uncertainty in this situation were naturally matters of concern to representatives of the longshoremen. Testifying before the House Select Subcommittee on Labor in July of 1972, Mr. Joseph Leonard, Safety Director of the International Longshoremen's Association ("ILA"), stated:

> What do we do, cut ourselves in half? Certain laws will give no compensation, which is a ridiculous situation. Federal laws cover the longshoreman if he falls from the ship into the water, but no Federal compensation if he falls from the dock into the water.
>
> Federal compensation law stops at the gangplank to the pier. When you come off the gangplank you come under a different law; you come under the State. Thirty-six States cover these docks and maybe more now with the inland waterways. [*Long-*

> *shoremen's and Harbor Workers' Compensation Act: Hearings on H.R. 247, H.R. 3505, H.R. 12006 and H.R. 15023 Before the Select Subcomm. on Labor of the House Comm. on Education and Labor*, 92d Cong., 2d Sess. 297 (1972) hereinafter "*House Hearings*").]

The anomaly identified and described by Mr. Leonard would have been greatly exacerbated by provisions of the 1972 amendments implementing substantial increases in federal benefits for covered injuries. The Committee Reports recognize this point:

> It is apparent that if the Federal benefit structure embodied in the Committee bill is enacted, there would be a substantial disparity in benefits payable to a permanently disabled longshoreman, depending on which side of the water's edge the accident occurred. [*H.R. Rep. No. 1441, 92d Cong., 2d Sess. 10 (1972); S. Rep. No. 1125, 92d Cong., 2d Sess.* 13 (1972).]

It is significant, however, that at no point in the legislative history of the 1972 amendments is there any suggestion that Congress intended to enact, or was even asked to enact, a solution to any other coverage problem than that of the longshoreman or longshore gang "cut in half" by an artificial coverage line drawn at the water's edge.

In the absence of any contrary language in the Act, or any contrary indication in the legislative history, the 1972 coverage amendments should not be construed to expand the federal longshore compensation system to include categories of persons other than the longshore loading and unloading gang which was the focus of both the *Nacirema* and *Victory Carriers* decisions.[11] As will be

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[11] Where there is doubt about how inclusively a statute should be construed to apply, if the mischief that it was exacted to remedy can be perceived it will be construed to apply only so far as

shown below, the extension of coverage from shipboard longshoremen to all members of the longshore gang brought a substantial number of new employees under the coverage of the Act.[12] If Congress had any intention to expand the Act still further to include all of the wide variety of persons whose occupations happen to bring them to the waterfront, it may be presumed that Congress would have expressed that intention by some language in the Act or, at a minimum, by some indication in the legislative history of the 1972 coverage amendments. Specifically, in the absence of any such indication and in the context of the problem which Congress was addressing when it enacted the 1972 amendments, it cannot be concluded that Congress meant to cover all of the large numbers of persons who participate in waterfront freight-handling up to and including the point of delivery to the consignee (in the case of import cargo) or receipt from the consignee (in the case of export cargo).

The issue then becomes one of determining the point, in the wide range of activities which take place between the ship and the consignee, at which Congress meant to draw the coverage line. As will be shown below, the

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needed in order to effectuate the remedy. 2A Sutherland, Statutory Construction, § 54.04 (4th ed. 1973).

See United States v. *Champlin Refining Co.*, 341 U.S. 290 (1951) (statute cannot be divorced from circumstances existing at the time it was enacted and from the evil which Congress sought to correct and prevent); *Stanga* v. *McCormick Shipping Corp.*, 268 F.2d 544 (5th Cir. 1959) (an accepted canon of construction is to look to the evil to be remedied).

[12] A representative of the International Longshoremen's Association testified to the House Committee that in the process of loading or unloading a container ship only four longshoremen in the gang would actually be aboard ship during the loading or unloading operation. See p. 19, *infra*. The 1972 amendments expanded coverage from these four to the entire twenty-three member gang.

only coverage line which is consistent with the Act, its legislative history, and commonly accepted definitions of longshoring operations (both in the industry and in prior judicial decisions) is the line which defines the activity of loading and unloading cargo from a vessel. Any other line produces anomalous or arbitrary results of the very kind which the 1972 amendments were enacted to prevent.

Thus, the 1972 amendments cannot be construed to extend coverage to persons, such as Blundo, who are injured while engaged in activities far removed, in terms of time, place, and function, from the longshore activity of taking cargo on or off a vessel. The Committee Reports could hardly have stated the intent of Congress on this point more plainly:

> The intent of the Committee is to permit a uniform compensation system to apply to employees *who would otherwise be covered by this Act for part of their activity.* [*H.R. Rep. No. 1441, supra* at 10-11; *S. Rep. No. 1125, supra* at 13; emphasis added.]

Employees not engaged in an activity, such as loading or unloading, which requires them to go aboard ship would not "otherwise be covered for part of their activity" because no part of their activity is upon navigable waters. By its terms, therefore, this statement of Congressional intent limits the effect of the 1972 coverage amendments to those employees engaged in activity carried out in whole or in part upon navigable waters, and excludes coverage of terminal or warehouse employees whose duties do not at any time require them to go aboard ship.

As expressed in the legislative history of the 1972 amendments, the "status" test is not satisfied merely by a showing that the injured worker has from time to time in the past satisfied the Act's former "situs" test by working on navigable waters. As will be shown later in this brief, an injured worker's former activities are

irrelevant to his "status" under Section 2(3).[13] Instead, the test is whether at the time of injury the worker in question was taking part in "activity" (*i.e.*, loading/unloading, shipbuilding, ship repair, etc.) which was being carried out in whole or in part over navigable waters. This test would extend coverage to any member of a longshore gang which is engaged in loading or unloading a vessel, whether or not the particular gang member's injury occurs aboard ship, and whether or not that gang member's duties require him to go aboard ship. The test would deny coverage, however, to warehouse or terminal workers engaged in cargo-handling activity long after the unloading has been completed and the vessel has sailed. No "part" of such activity would "otherwise be covered" under the Act; therefore, it would be contrary to Congressional intent to extend coverage to the whole activity even when it happens to occur at a covered situs.

Congress' emphasis on the injured worker's activity, as contrasted with his particular location (land or water) during the activity, is illustrated by two examples which appear in the Committee Reports. The first is a reference to modern cargo-handling techniques which have reduced the number of members in any given longshore gang who are required to remain aboard ship during the loading or unloading process:

> It is also to be noted that with the advent of modern cargo-handling techniques, such as containerization and the use of LASH-type vessels, more of the longshoreman's work is performed on land than heretofore. [*H.R. Rep. No. 1441, supra* at 10; *S. Rep. No. 1125, supra* at 13.]

The point of this reference is that, as fewer members of the typical longshore gang are required to go aboard ship, fewer would be covered under the pre-1972 situs

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[13] *See* pp. 60-64 *infra*.

test. The typical general cargo or break-bulk [14] gang in New York, for example, places a minimum of eight of its twenty members physically aboard the ship as "holdmen" to make up drafts or perform other functions necessary in a break-bulk operation. In addition, other members of the gang, such as the ship's crane or winch operators, may also work aboard ship in a break-bulk operation.[15] By contrast, the standard *container* gang in New York consists of twenty-three men, only four to six of whom are "holdmen" required to remain aboard ship. The rest of the gang, including yard hustler drivers, crane operators, gangway men, and dock workers, remain on the shore during the loading or unloading operation. Those on the pier do not stuff or strip containers [16] (a terminal employee function) but take part in the uninterrupted process of moving the loaded containers between the container marshalling yard (point of rest) and the ship. Those members of the standard container gang who remain ashore are no less gang members, and no less directly involved in the loading or unloading process, than their counterparts in the typical break-bulk gang.

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[14] Break-bulk cargo is composed of items of varying size and form, which must be handled separately and individually stored in the wings of the hold, as opposed to dry-bulk cargo, such as wheat, and liquid-bulk cargo such as oil, both of which are simply poured into the hold. [Goldberg, *Containerization as a Force for Change on the Waterfront*, 91 Monthly L. Rev. 8 at n. 7 (1968).]

[15] *See* New York Collective Bargaining Agreement, Part X:

> Size of Gangs and Working Rules. 1. (a) Minimum number of men in gang when loading or discharging general cargo shall be 20 men, not less than 8 holdmen and the balance of the gang to be distributed between the hold, deck and dock at the discretion of the employer.

This agreement is a public document on file with the Department of Labor, Bureau of Labor Statistics, Office of Wage and Industrial Relations, Division of Industrial Relations (File No. 5423).

[16] "Stuffing" is the process of placing cargo in a container for export; "stripping" is the process of taking cargo out of a container which has been unloaded from a vessel.

It is fully consistent with the 1972 amendments, therefore, to extend coverage to all container gang members directly engaged in the loading/unloading process, regardless of their particular functions in the gang.

The shrinking proportion of longshore gang members covered by the old situs requirement was a problem specifically pointed out to the House Committee by Mr. Leonard of the ILA in connection with his discussion of coverage problems under the old Act:

> When they talk about more men working on the ships, we will debate this any day of the week, because on a container ship, which is over 50 percent of our work today, we have four men on the ship at each hatch. We have two hatches. The rest of the men are out on the dock driving trucks or moving around in the area or on the overhead crane. [*House Hearings, supra* at 299.][17]

A second illustration of the amended coverage tests which appears in the Committee Reports is the reference to coverage of checkers:

> However, checkers, for example, *who are directly involved in the loading or unloading functions* are covered by the new amendment. [*H.R. Rep. No. 1441, supra* at 11; *S. Rep. No. 1125, supra* at 13; emphasis added.]

This reference is of particular importance to this case because Blundo was employed by ITO as a checker during his five years of employment prior to the accident (A. 63); but was *not* "involved in the loading or unloading function" at the time of his injury. In industry practice and parlance, a checker is not considered a longshoreman, nor is he normally part of the longshore gang hired

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[17] It should be noted that Mr. Leonard was apparently referring to two separate gangs of about 23 men each, only 4 of whom in each gang work in the hold.

to load or unload a vessel.[18] Nevertheless, he may be assigned to work directly with the gang in the loading or unloading function, checking cargo as it moves from vessel to the point of rest on the pier (or vice versa in the loading process). The coverage test applicable to checkers again reflects the intent of Congress to make coverage dependent on the practical fact of the injured worker's participation in the loading or unloading activity, rather than on his own physical activity or location. The other side of this statement, of course, is that checkers (such as Blundo) who are *not* "directly involved in the loading or unloading functions" are not covered by the Act.

2. *In the case of longshoremen and other persons engaged in longshoring operations, "maritime employment" is the process of loading or unloading vessels.*

As discussed above, Congress was clearly determined to eliminate or reduce the importance of the "fortuitous circumstance" of situs as a determinant of federal compensation coverages.

> The Committee believes that the compensation payable to a longshoreman or a ship repairman or builder should not depend on the *fortuitous circumstance* of whether the injury occurred on land or over water. [*H.R. Rep. No. 1441, supra* at 10; *S. Rep. No. 1125, supra* at 13; emphasis added.]

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[18] *See* L. Rubin and W. Swift, "The Negro in the Longshore Industry" in *Negro Employment in the Maritime Industries*, Vol. VII—Studies of Negro Employment (The Wharton School, University of Pennsylvania, 1974) (hereinafter cited as "Rubin and Swift") at 10: "[C]heckers, who are not part of the regular longshore gang, are assigned to check and record the cargo being loaded or unloaded." The intent of Congress to cover checkers directly involved in loading or unloading as well as those workers normally considered longshoremen accounts for the phrase, "longshoremen or others engaged in longshoring operations," (*i.e.*, loading and unloading ships) in the Section 2(3) definition of "employee".

> * * * even if an employee does not *happen to be* over navigable waters at the time he is injured, he will be covered as long as he is working as a longshoreman or harborworker, whether engaged in repairing a vessel or unloading it. [118 Cong. Rec. 36385 (1972) (Rep. Steiger); emphasis added.]

It is important to recognize, however, that in expanding the situs requirement Congress had no thought of enlarging the scope of "maritime employment" to which the Act applied.[19] The circumstance of situs was in Congress' view "fortuitous" only insofar as it artificially "cut in half" the loading/unloading function which Congress saw as the real subject matter of the Act. The liberalization of "situs" may not therefore be construed in such a manner as to vitiate the "status" requirement which Congress so deliberately fashioned:

> The Committee does not intend to cover employees who are not engaged in *loading, unloading,* repairing or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity. [*H.R. Rep. No. 1441, supra* at 11; *S. Rep. No. 1125, supra* at 13; emphasis added.]

The Committees' examples of covered and non-covered employment confirm the general rule stated above, that the "maritime employment" of longshoremen (and others engaged in longshoring operations) is the loading and unloading of vessels alongside a pier:

> [Longshore gang:]
>
> To take a typical example, cargo, whether in break bulk or containerized form, is typically *unloaded*

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[19] At least one Court of Appeals has held that the "maritime employment" requirement of Section 2(3) narrowed the scope of coverage even on navigable waters, excluding certain categories of workers who were covered under the Act before 1972. *Weyerhaeuser v. Gilmore, supra.* It is not necessary to reach this issue in this case because Blundo's injury did not occur on navigable waters and would therefore not have been covered under the prior Act.

> from the ship and immediately transported to a storage or holding area on the pier, wharf, or terminal adjoining navigable waters. The employees who perform this work would be covered under the bill for injuries sustained by them over the navigable waters or on the adjoining land area. [*H. Rep. No. 1441, supra* at 11; *S. Rep. No. 1125, supra* at 13; emphasis added.]
>
> [Terminal labor; clerical employees:]
>
> Thus, employees whose responsibility is only to pick up stored cargo for further trans-shipment would *not* be covered, nor would purely clerical employees whose jobs do not require them to participate in the *loading or unloading* of cargo. [*Id.;* emphasis added.]
>
> [Checkers:]
>
> However, checkers, for example, who are directly involved in the *loading or unloading* functions are covered by the new amendment. [*Id.;* emphasis added.]

As applied to Blundo, a checker, the test of coverage is whether at the time of his injury he was "directly involved in the loading or unloading functions." The "loading or unloading functions" referred to by the Committee refer to that activity formerly covered in part by the Act, namely, the activity of a longshore gang moving cargo between a vessel and a point of rest on the shore. As will be explained more fully below, Blundo was not a member of the longshore gang which unloaded the container in question from the container vessel, and he took no part in the unloading process. Therefore, he did not meet the "status" test of Section 2(3) at the time of his injury and was not covered by the Act.

B. *At the time of his injury Blundo was involved not in the stevedoring function of loading or unloading a vessel, but in the terminal operation function of stripping a container.*

In order to appreciate Blundo's employment status at the time of his injury, it is necessary to understand in some detail both the structure of work on the waterfront and the physical process of loading and unloading ships. Although longshore practices vary somewhat from port to port, the interplay of common economic and technological factors, strong longshore labor unions, and the unifying influence of federal maritime jurisdiction, has resulted in a substantial uniformity within the stevedore and marine terminal industries at United States ports. This uniformity makes it possible to make certain general observations regarding the industry which are essential to an understanding of the 1972 amendments to the Act.

1. *The stevedoring function and the marine terminal operation function are separate and distinct waterfront activities.*

An accurate and concise distinction between the stevedoring and marine terminal operation functions appears in a recent report of the Department of Labor relative to the Office of Workers' Compensation Programs:

> The marine terminal operator, who may own or lease the terminal property, is responsible for the safe handling of the ship, the delivery and receipt of ship's cargo, and all movement and handling of cargo between the point-of-rest and any place on the marine terminal property except to shipside. The terminal property includes heavy lift cranes, forklift trucks, straddle carriers, platform trailers, and other equipment. In most ports, stevedore contractors and marine terminal operators are separate and unrelated jobs.

> A stevedore or stevedore contractor is responsible for loading or unloading a ship in port by contract with a shipowner, agent, or charter operator. In the past, the stevedore, as the employer of the longshoreman, was a labor broker with little financial investment beyond providing safety and primitive cargo handling equipment. Currently, the stevedore has a substantial financial investment in such cargo handling equipment as forklift trucks, newsprint roll handling equipment, trailers for the placement of cargo containers, bulldozers, payloaders, and other machinery.
>
> Stevedore operations are confined to the area between the ship and the terminal area called the "point of rest." This is the area close to the ship being loaded or unloaded where cargo is placed before delivery or further handling by the owner or operator of the marine terminal.[20]

The Federal Maritime Commission confirms the distinctions drawn above. According to the Commission, terminal "handling" is "[t]he service of physically moving cargo between point of rest and any place on the terminal facility, other than the end of the ship's tackle." 46 C.F.R. § 533.6 (1976). Terminal "loading and unloading" is "[t]he service of loading or unloading cargo between any place on the terminal and railroad cars, trucks, lighters or barges to or from the terminal facility." *Id.*[21]

The same distinctio· is reflected in the results of a

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[20] *Office of Workers' Compensation Programs, U.S. Dept. of Labor, Task Force Report* at 103-104 (1976) (hereinafter "*OWCP Task Force Report*"). The findings and recommendations of the Task Force were submitted for the approval of the Secretary of Labor on Dec. 15, 1976.

[21] *See also Truck and Lighter Loading and Unloading*, 9 F.M.C. 505, 511-12 (1966) (stevedoring is "breaking cargo out of stow in the ship's hold, lifting the cargo from the vessel and depositing it on the pier's stringpiece and then carting it by hi-los to the place of rest designated by the stevedore").

recent survey conducted by the National Association of Stevedores of practices at 36 major United States ports:

> Essentially, the movement of water-borne commerce across marine terminals in the United States involves two distinct and separate functions which are performed by two distinct employers. The stevedore employer hires longshore labor to physically load cargo onto or unload cargo from a vessel. In the case of imported cargo, the cargo unloaded from the vessel is moved by the longshore workers to storage area, holding area, or marshalling area known throughout the maritime industry as the "point of rest". In the case of exports, the cargo is moved from the "point of rest" to and then onto the vessel.
>
> Any movement or handling of water-borne cargo, import or export, between the point of rest and any place on the marine terminal or away from the terminal facility is a terminal operation performed by a marine terminal operator, private or public. The labor which performs such functions are terminal labor, sometimes called "shortshoremen". Although the workers which perform stevedore and terminal functions may be from the same union organization, each class of worker is paid from a separate payroll and are subject to special work rules.
>
> The statements all agree on one concept long accepted throughout the maritime industry—that there is a clear and distinct line of separation between stevedoring and marine terminal functions. The functional separation takes place at the point of rest where control and responsibility for the cargo is transferred between the stevedore and the marine terminal operator. Labor contracts change at the point of rest as does the interest for whom the services are performed. * * * [22]

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[22] This survey is reprinted at pp. 7a-77a of the Appendix to the Memorandum filed by the National Association of Stevedores in response to the Petition for Writ of Certiorari in *Adkins* v. *I.T.O.*

Although sometimes a single company will perform both stevedoring and marine terminal services, very often these functions are carried out by separate companies. The distinction between stevedoring and terminal operations is especially clear in those ports, such as Camden, New Jersey,[23] Portsmouth, Rhode Island,[24] Charleston, South Carolina,[25] Georgetown, South Carolina,[26] Jacksonville, Florida,[27] Savannah, Georgia,[28] Wilmington, North Carolina,[29] Mobile, Alabama,[30] and others, where the employees who perform terminal labor are actually *State government employees*, a class Congress clearly did not intend to cover.

In the Port of New York, where Blundo was employed at the time of his injury, the distinction between terminal and stevedoring functions is strictly maintained:

> Historically our industry in New York has been divided into two segments—Stevedoring and Terminal operations. Prior to the Waterfront Commission, truck loading and unloading was done by Public Loaders and vessel operations performed by contract stevedores. Their functions were distinct and separate. After the demise of the Public Loaders, the majority of large steamship companies performed their own terminal operations while vessel work remained with the contract stevedore. Most stevedoring companies then assumed the role of

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Corp., No. 76-730, *petition for cert. filed* November 24, 1976. The section of the survey cited above appears at pp. 11a-12a of the Appendix (NAS Mem. A. 11a-12a).

[23] *Id.* at 21a. (Camden Marine Terminal).

[24] *Id.* at 25a (Davisville, Rhode Island Pier 1 & 2).

[25] *Id.* at 28a.

[26] *Id.* at 29a.

[27] *Id.* at 30a.

[28] *Id.* at 44a.

[29] *Id.* at 48a.

[30] *Id.* at 55a.

terminal operator in the servicing of their various accounts. It was not then and still is not unusual today, however, to have two different contractors (stevedoring and terminal) servicing a steamship company on the same facility.

As previously mentioned there is a clear distinction between the function of a stevedore and terminal operator in the Port of New York. The stevedores responsibility lies in the handling of cargo between the ship and the "point of rest" as defined by the Federal Maritime Commission in its General Order 15. All other services are handled by the terminal operator. Labor is specifically hired by category and is allocated and shown to be utilized in either the stevedoring or terminal function by the operator.[31]

The distinction between stevedoring and terminal operations in New York manifests itself in the details of employment practices:

* * * *

b) Terminal facilities—most are owned by the New York-New Jersey Port Authority or the City of New York and are leased directly to a steamship company or a terminal operator. In many instances a steamship company will lease the facility and will engage a terminal operator for both the stevedoring and terminal function. In other cases a company will be employed to perform stevedoring function while the terminal operations will be performed by a different company. The stevedoring company's function is between the vessel and a place of rest with the terminal function taking over from that point.

c) Union contracts call for the hiring of labor by category *i.e.*, terminal labor, drivers, ship labor, checker, coopers, maintenance, mechanics, etc. A man cannot be hired for terminal labor and be assigned to work on a vessel or vice versa.

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[31] *Id.* at 27a.

d) Separate allocations of payrolls are made for vessel and terminal operations even when handled by the same company. Such a difference is necessary also for cost analysis as in most cases rates are quoted on a separate basis.

* * * *

g) Cargo checkers could be utilized in both vessel and terminal operations during the same day when performed by the same contractor. It is normal, however, for a checker to spend a full day in either operation without shifting. When performing in both functions each area is easily defined.

h) Truck and car loading and unloading is performed by longshoremen and drivers with terminal labor category. They are employed by the company performing the terminal labor services.[32]

2. *The stevedoring function of loading and unloading vessels is carried out by longshore gangs engaged on an hourly basis through a union hiring hall by a stevedore employer.*

The distinction between the stevedoring and marine terminal functions is reflected in the strict divisions among categories of employees on the waterfront. As noted above, in the Port of New York separate allocations of payrolls are maintained for terminal and stevedoring employees, and union contracts require that labor be engaged by categories (checker, driver, terminal labor, etc.) which also reflect the division between terminal and stevedoring labor. In many ports terminal and stevedore laborers belong to different locals of the same union,[33] or different unions. As noted above, terminal employees are often state or local government employees working for the Port Authority. Among private employers, extended

[32] *Id.* at 26a-27a.

[33] *Id.* at 11a.

definitions of stevedore (longshore) and terminal (warehouse) employment appear in many collective bargaining agreements.[34]

The division of labor reflected in longshore labor agreements is perfectly consistent with the strict distinction

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[34] *See, e.g.*, the Deepsea Longshore Agreement and the Warehouse Contract for Southeast Florida:

> Longshore Work Defined, Gang Sizes, Employers Rights
>
> 13(A)(1) Longshorework is to cover all labor used in connection with loading or discharging ships, barges or other floating craft. It will include men engaged in handling cargo to or from point of rest or to or from cars or trucks when handled direct to or from ships. It will also include all operators of mechanical equipment used in such operations, provided, however, that this shall not require the employers to alter any existing practices. It will also cover coopering or reconditioning of cargo when performed in connection with stevedoring work; the handling of ship's stores when not carried by hand up the gangway; the handling of baggage to and from ship's deck of passenger vessels; all mail; dunnaging (excluding bulk separations); rigging (excluding rigging for heavy lifts); and the following operations when vessel is alongside dock; cleaning of cargo areas aboard ship, lashing and unlashing and securing of cargo, and the fitting and dismantling of fittings. It will also include gearman (not mechanics) when assigned to ships; the operation of all permanently mounted shipboard cranes and winches; and the handling of lines when performed by stevedores. It also includes opening and closing of hatches on conventional type vessels with between decks when working general cargo. * * *
>
> Warehouse Work
>
> 13(A) Warehouse work shall be defined to include handling of cargo in shipside warehouse/transit sheds and port areas, when such cargo is not handled in conjunction with ships loading or discharging.
>
> Warehouse work will include loading and discharging of railroad cars, loading and unloading of drop trailers and piggyback trailers; also the loading and unloading of trucks and trailers where the nature or weight of the cargo is such that this loading or unloading cannot be accomplished by driver, the employer will use I.L.A. labor to help the driver. * * * [*Id.* at 36a-38a.]

between stevedore and terminal labor which in practice prevails on the waterfront. The physical loading and unloading of ships is typically performed by a longshore gang, the exact composition of which for any given vessel depends on custom and agreement in the port in which the vessel is loaded or unloaded.[35] A description of the longshore gang structure is contained in the Department of Labor's recent OWCP Task Force Report:

> * * * Because ship arrivals are irregular, a stevedoring company may work several ships or none at all on any given day; consequently, the demand for labor varies widely from day to day.
>
> Longshoremen work in a gang or crew distributed between the ship and the pier so they can move

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[35] The significance of the gang structure in longshore work has been described by Rubin & Swift as follows:

> One of the most important features of longshore work is the gang structure requiring the coordinated efforts of men working in the hold, on the deck, and on the dock. Gang members have always been required to work closely together for long and continuous periods of time. Since cargo handling requires a team effort and emphasis has always been placed upon fast ship turn-around time, employers are primarily interested in keeping the gangs intact throughout the job rather than hire others unfamiliar with the ship and the other members of the gang. On the other hand, because the longshoreman does not know when the next ship will arrive or if his gang will be chosen to work, he prefers to work as long as the job lasts with little regard for time off. The resulting system of work relationships and patterns benefits both the employer and the employees. For the longshoremen, the permanent gang system increases his job prospects and for the employers, it increases efficiency and safety.
>
> In several of the major ports, gangs are hired rather than individual longshoremen. Usually, a gang boss or foreman, is selected for a job, and he either assembles his regular gang or chooses from among his following of longshoremen. In either case, the composition of the gang does not vary greatly from day to day. When a regular member of a gang is absent, the gang boss selects an "unattached" longshoreman to fill in on a temporary basis. [*Rubin and Swift, supra* at 11-12.]

> cargo in an uninterrupted flow. A longshoreman may be designated by the equipment he operates—*i.e.*, winchman or hustler operator, or by the area in which he works—*i.e.*, holdman. An average gang consists of 1 foreman, 6 to 10 men working in the hold of the ship, 1 hatchtender, 2 winchmen, and 6 to 8 truckers. The longshore gang varies from 12 to 20 workers for break bulk work (historically, the typical gang) to varying numbers for specialty work on bulk, containers, and utilized loads.
>
> For example, the typical break bulk gang in the port of Philadelphia is composed of 20 men: 15 regular and 5 new men. Nine to 12 are holdmen. Three of the best and most experienced are deckmen: one winch operator, one hatchman giving the signals, and one relief person. Four gang members are dockmen: two doorway men, who hook and unhook loads, and two forklift operators. One gang member, hired by the stevedoring company, serves as the foreman and hires the other gang members.[36]

The distinction between the work of the gang loading or unloading a ship and the work of terminal labor ("extra dock labor" or "extra labor") is one that is strictly maintained in labor contracts. For example, in Boston, the General Cargo Agreement clearly spells out the activities of "extra dock labor":

> Extra-dock labor shall be utilized for but not limited to the following purposes, coopering damaged cargo, palletization, *container loading and unloading*, and voluntary truck loading and unloading.
>
> The Employer has the right to assign the number of employees he selects and the place of employment at the terminal or pier.
>
> The Employer has the right to assign the employees at any time to another terminal under his control.

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[36] *OWCP Task Force Report* at 104.

> The consignee, shipper or his designee, shall have a free choice in his selection of a loading or unloading agent, such loading or unloading including but not limited to trucks, railroad cars and lighters.
>
> It is understood that further sorting that may be required after a vessel has completed its loading-discharging operation shall be performed by extra-dock labor as an independent operation at the time directed by the Employer and *shall not in any way be considered part of a gang operation.*
>
> Extra-dock labor may be given back to a finish orders.
>
> Extra-dock labor may be utilized to fillout incomplete gangs working at that terminal and/or pier when no additional men required by the Employer are available at the Hiring Hall.[37]

The same distinction is applicable in the Port of New York:

> The loading and unloading of vessels is done by gangs of longshoremen, under the immediate supervision of gang or hatch bosses. General work around the pier is done by longshoremen called extra labor.[38]

See also Part X, par. 4.A.5 of the current New York Collective Bargaining Agreement, *supra*, which provides that:

> Flexibility [in the assignment of men] shall not extend to the interchange of gang and terminal assignments.

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[37] *General Cargo Agreement between the International Longshoremen's Association and the Boston Shipping Association* (emphasis added). This agreement was part of the record in *Stockman* v. *John T. Clark & Sons, supra. See* Petition for a Writ of Certiorari in *John T. Clark & Sons* v. *Stockman*, No. 76-571, at 6.

[38] Fourth Report of the New York State Crime Commission (Port of New York Waterfront) (May 20, 1953), Appendix at 167.

3. *The process of loading or unloading a vessel consists of the continuous movement of cargo by a longshore gang between the deck or hold of a vessel and the cargo's point of rest on the adjoining pier.*

By settled industry practice, the stevedoring or longshoring operation of loading and unloading a vessel has been defined as the process of moving cargo between the deck or hold of the vessel and the cargo's point of rest on the adjoining pier. The Department of Labor's OWCP Task Force Report contains a discussion of the "Nature and Character of the Longshore Industry" which expressly confirms this definition:

> Stevedore operations are confined to the area between the ship and the terminal area called the "point of rest". This is the area close to the ship being loaded or unloaded where cargo is placed before delivery or further handling by the owner or operator of the marine terminal.[39]

Rubin and Swift's description of "longshore work" is similarly based on the concept of "point of rest":

> Nature of the Work
>
> In essence, longshore work consists of loading and unloading ships, and has been further defined as "all handling of cargo in its transfer from vessel to first place of rest, and vice-versa, including sorting and piling of cargo from vessel to railroad car or barge, or vice-versa." [Note 2. Pacific Coast Longshore Agreement, 1956, as cited in Maritime Cargo Transportation Conference, Longshore Safety Survey (Washington: National Academy of Sciences, 1956), p. 13.] The entire cargo-handling operation is somewhat more complicated, however, and it is appropriate first to differentiate the various jobs performed by longshoremen from those

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[39] *OWCP Task Force Report* at 104.

> done by other laborers working in the port area, and secondly to describe the job functions within the longshore gang. This can be accomplished by tracing the movement of cargo through the loading process. It should be noted, however, that the occupational structure in the industry varies somewhat from port to port.
>
> Generally, cargo arrives on the pier by truck or by railroad car several days prior to its scheduled loading aboard ship. When the cargo is delivered to the terminal, it is separated, grouped, and stored in the marine terminal adjacent to the dock loading area. Once placed in temporary storage, the cargo is said to be in its "last place of rest." Up to this point, the work is generally performed by truck drivers, helpers, and warehousemen, although in some ports it is feasible for longshoremen to perform these functions.
>
> Typically, longshore work begins with the movement of cargo from this "last place of rest," combining the efforts of three separate units of dock, deck, and hold gangs, which comprise the larger longshore gang. * * *[40]

The "point of rest" concept goes far toward providing a clear test by which to distinguish the activities of vessel loading and unloading from various other waterfront activities not covered by the Act. In every United States port, the "point of rest" of export and import cargo marks a familiar dividing line actually used or referred to by the industry and its employees in stevedore contracts, terminal operation or warehousing contracts, collective bargaining agreements, hiring practices, maritime tariffs, and other practical business transactions which are entered into on a daily basis.[41] Those who make

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[40] *Rubin and Swift, supra* at 9-10.

[41] *See Pacific Coast Longshore Agreement,* (1956) quoted in National Academy of Sciences-National Research Council, Maritime

their living on the waterfront, employer and employee alike, recognize the point of rest and refer to it continually in their occupation.

There is no doubt that "point of rest" is an accepted demarcation of responsibilities at the Port of New York where Blundo was injured. The Federal Maritime Commission has labelled "correct" an examiner's determination that stevedoring at New York with respect to import cargo is "one process of breaking cargo out of stow in the ship's hold, lifting the cargo from the vessel and depositing it on the pier's stringpiece and then carting it by hilos to the place of rest designated by the stevedore." [42] The recent OWCP Task Force Report quoted *supra* similarly describes the stevedoring function as cargo handling between ship and "point of rest" which is defined as "the area close to the ship being loaded or unloaded where cargo is placed before delivery or further handling by the owner or operator of the marine terminal." [43]

Outside the industry, the point of rest concept has frequently been recognized and relied upon by courts and agencies which have dealt with issues arising out of the maritime occupation of loading and unloading vessels." [44]

Cargo Transp. Conf., *Longshore Safety Survey* 13 (1956) (longshorework is " 'all handling of cargo in its transfer from vessel to first place of rest, and vice versa' "). *See also Los Angeles By-Products Co.* v. *Barber S.S. Lines, Inc.*, 2 U.S.M.C. 106, 111 (1939); *Empire State Highway Trans. Ass'n.* v. *American Export Lines, Inc.*, 5 F.M.B. 565, 572 (1959); *Los Angeles Traffic Mgrs. Conf., Inc.* v. *Southern California Carloading Tariff Bureau*, 3 F.M.B. 569 (1951); 46 C.F.R. § 533.6 (1976) ("point of rest" defined for purposes of terminal tariffs).

[42] *Truck and Lighter Loading and Unloading, supra* at 511-12.

[43] *OWCP Task Force Report* at 104.

[44] *E.g., ILA* v. *North Carolina State Ports Authority*, 332 F. Supp. 95, (E.D.N.C. 1971), *rev'd on other grounds*, 463 F.2d 1 (4th Cir.), *cert. denied*, 409 U.S. 982 (1972); *American President Lines, Ltd.* v. *Federal Maritime Bd.*, 317 F.2d 887, 888 (D.C. Cir. 1962) (duty

On occasion, however, courts and agencies not well versed in, and not well advised of, the nature of longshoring operations have misunderstood the meaning and significance of point of rest in the loading/unloading process. In order to avoid any such misunderstanding in this case, considerable care has been taken in this brief to demonstrate the importance of point of rest and its relationship to the activity of loading and unloading vessels. Two further observations regarding point of rest require specific mention.

First, the point of rest of export and import cargo should not be confused with the point at which unloaded cargo is first deposited onto the pier at the "ship's side" by the crane operator. This location, sometimes referred to as "under the hook," is not ordinarily a point of rest because the practical nature of the unloading process requires that cargo be removed therefrom continuously to make room for additional cargo as it is unloaded from the ship. Similarly, in the loading process the last point of rest is not that location at the "ship's side" from which the crane lifts drafts, pallets, or containers for loading into the ship. Rather, it is the temporary storage or holding area from which the longshore gang moves

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of carrier extends to placing cargo at a "place of rest on the pier"); *Los Angeles Traffic Mgrs. Conf., Inc.* v. *Southern California Carloading Tariff Bureau*, 3 F.M.B. 569 (1951); *Carloading at Southern California Ports*, 3 U.S.M.C. 137 (1949); *Status of Carloaders and Unloaders*, 3 U.S.M.C. 116, 118 (1949); *In re Assembling and Distributing Charge*, 1 U.S.S.B. 380, 383-85 (1935); *Associated Jobbers & Mfrs.* v. *American-Hawaiian S.S. Co.*, 1 U.S.S.B. 198, 200 (1931); *J. G. Boswell Co.* v. *American-Hawaiian S.S. Co.*, 2 U.S.M.C. 95 (1939); *In the Matter of the Arbitration Between Pacific Coast District Local 38 and Waterfront Employers* (1934), 25 NLRB San Francisco Admin. File, Box 485; *Rubin and Swift* at 10, (longshore work begins at "last place of rest"); *Longshore Safety Survey, supra* at 17; Ross, Waterfront Labor Response to Technological Change: A Tale of Two Unions, 21 Labor L. J. 397, 398 (1970) ("loading and unloading * * * consists of moving cargo from the hold of the ship to the first place of rest on the dock.")

cargo in a continuous process of loading a vessel. The point of rest should therefore be viewed not mechanically as the place of first or last physical contact between cargo and pier, but functionally, as a signal that the activity of loading or unloading has begun or is complete.

Second, the point of rest is not primarily a geographic concept, although its geographic contours may be quite precise at any given waterfront facility. As explained above, the point of rest is a functionally determined point, the geographical location of which at any given facility may depend upon a variety of practical factors inherent in the loading or unloading process. Thus, reference to point of rest in interpreting the Act's coverage does not, as has been suggested,[45] create a new "situs" requirement. Rather, it helps to establish the "status" requirement by fixing a realistic point, well recognized in the longshore industry, at which the "maritime employment" of loading and unloading vessels begins or ends. A member of a longshore gang who is engaged in unloading cargo to the point of rest does not lose coverage by stepping shoreward of the point of rest. Conversely, a terminal employee who happens to wander seaward of the cargo's point of rest long after the unloading process has been completed does not thereby become eligible for coverage. The test of coverage in each case, insofar as "status" is concerned, is not the injured worker's location with respect to the point of rest, but his participation in the process of moving cargo between the point of rest and the ship.

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[45] *I.T.O.* v. *Benefits Review Bd.*, *supra* at 1096-97 (Craven, J., dissenting).

4. *In the case of a container operation, the process of unloading ends when the container has been removed from the vessel, placed on a truck chassis, and carried to its point of rest in the container marshalling yard.*

Blundo was injured while checking the contents of a container which had been unloaded from the vessel by a longshore gang as much as a week before, placed at rest in the container marshalling yard of the unloading terminal, trucked by an independent common carrier several miles over public streets to ITO's 19th Street pier in Brooklyn, and placed alongside the bonded warehouse at that location. By any standard discernible in industry practice or the legislative history of the 1972 amendments, the process of unloading had ended long before Blundo began work on the day of his injury. As in the case of other types of cargo, the process of unloading containerized cargo ends when the container reaches its point of rest in the container marshalling yard.

Although containerization has revolutionized the shipping industry, the process of loading and unloading containerized cargo is not conceptually different from the process of loading and unloading general or break-bulk cargo. The work is done by a longshore gang hired specifically for the loading or unloading of the particular vessel. The gang is supervised by a foreman, or hatch boss. In New York, the other members of the standard container gang include four to six holdmen who work on the vessel, two gangway men, three crane operators, six dock workers, and five yard-hustler or truck drivers. In the case of unloading, containers are lifted from the deck or hold of the container vessel by a large pier-based crane, and lowered onto an empty truck chassis pulled by a "yard hustler" driven by a member of the gang.[46] The

[46] In some unloading operations the container is placed directly onto railroad cars or trucks for immediate transshipment beyond the terminal.

container is then driven away from the ship's side toward the container marshalling yard nearby, and another yard-hustler drives into position "under the hook" to receive the next container.

The container marshalling yard is the place within the container terminal where containers are stored temporarily awaiting further transshipment to consignees or terminal operators (import cargo) or loading aboard ship (export cargo). Geographically, the marshalling yard is a precisely defined area, separate and apart from other areas in the terminal. Upon arrival at its designated location in the marshalling yard, the container is detached or removed from the yard-hustler, which then drives back to ships side to pick up another container.

The longshore gang members, from the holdmen to the yard-hustler drivers, who are responsible for removing the container from the vessel to the container marshalling yard are engaged in the unloading function and are therefore covered by the Act:

> To take a typical example, cargo, whether in break bulk or containerized form, is typically unloaded from the ship and immediately transported to a storage or holding area on the pier, wharf, or terminal adjoining navigable waters. The employees who perform this work would be covered under the bill for injuries sustained by them over the navigable waters or on the adjoining land area. [*H.R. Rep. No. 1441, supra* at 11; *S. Rep. No. 1125, supra* at 13.]

Similarly, checkers "directly involved" in the gang's unloading work would also be covered.[47] To extend coverage beyond this group of employees, however, to the various categories of waterfront workers not involved in loading or unloading vessels, would be contrary to the intent of the 1972 coverage amendments.

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[47] *H.R. Rep. No. 1441, supra* at 11; *S. Rep. No. 1125, supra* at 13.

The arrival of the container at its point of rest in the marshalling yard is a significant event in the movement of cargo from the vessel to the consignee, for it is at this stage in the process that the stevedoring function of unloading the vessel ends, and the terminal, warehousing or transshipment functions begin. What happens to a container after it leaves the marshalling yard depends on a variety of factors and considerations which bear little or no relation to the nature of the activity covered by the Act.

For the first few days after unloading, known as "free time," the container may remain at the marshalling yard without being assessed "demurrage" or storage charges.[48] Ordinarily, cargo is removed from the point of rest within the "free time" period or shortly thereafter. Very frequently, however, cargo (whether containerized or break-bulk) remains at the point of rest for long periods of time after the vessel has been unloaded, or before it is loaded.[49]

After the container is picked up from the marshalling yard, it is no longer possible to generalize about what happens to it. Depending on the circumstances, the container may be picked up by the consignee, by his agent, by the terminal operator, or by an independent trucking firm. The container may be transported inland to the

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[48] The concept of "free time" is defined in the regulations of the Federal Maritime Commission at 46 C.F.R. § 533.6 (1976).

[49] *See Dellaventura* v. *Pittston Stevedoring Corp.*, 2 BRBS 340 (Oct. 9, 1975) (113 days before loading); *Spataro* v. *Pittston Stevedoring Corp.*, 1 BRBS 42 (ALJ) (Feb. 6, 1975) (23 days after unloading); *Esposito* v. *Hellenic Lines, Ltd.*, 1 BRBS 84 (ALJ) (Mar. 24, 1975) (13 days after unloading); *Foundation* v. *Puget Sound Terminals, Inc.*, 1 BRBS 95 (ALJ) (April 3, 1975) (14 days after unloading); *Eutsay* v. *Universal Terminal*, 2 BRBS 83 (ALJ) (June 26, 1975) (at least 3 weeks after unloading); *Robinson* v. *Northern Metal*, 2 BRBS 240 (ALJ) (Sept. 8, 1975) (5 weeks after unloading).

consignee's warehouse or to an independent freight consolidation warehouse, or it may be transported to a warehouse in the same terminal, or to another pier or warehouse in the same port, or even to a pier or warehouse in some other port. The container may ultimately be stripped by employees of the consignee, or of his agent, or of an inland warehouse, or of the terminal operator, or of the Port Authority. The company doing the stripping may or may not be the same company which has performed the unloading function, and may or may not be an "employer" under the Act. The stripping may or may not be done at a covered "situs". For the most part, the circumstances which determine where and by whom the container is stripped are fortuitous in the sense that they have little or nothing to do with the physical work being performed.

The extension of the Act's coverage to the activity of stuffing and stripping containers and other terminal functions would give rise to new anomalies more serious than that which the 1972 amendments were intended to correct. These potential anomalies arise from the fact that, unlike the activity of loading or unloading a vessel alongside a pier, there is nothing inherent in the activity of stuffing and stripping containers (or other terminal functions) which requires that it be done in a location adjacent to navigable waters, or that it be done by employees of an "employer" otherwise engaged in maritime employment.

Accordingly, under the holding of the court below, the primary differentiating factor among cases involving stuffing and stripping would be not the nature of the work performed, but the situs of the injury. Stuffing and stripping performed on a pier would be covered, while the same stuffing and stripping operation in an off-pier warehouse located in the same port would not be covered, even if performed by members of the same union, hired

by the same employer, as the employee working on the pier. Thus, the fortuitous fact of situs would again be elevated to the determinative criterion—*exactly the situation Congress meant to remedy.*

From an economic standpoint, this disparity is potentially far more significant than the disparity of the longshore gang member "cut in half" at the water's edge. The stuffing and stripping station on the pier must compete for business with off-pier stuffing and stripping stations, whether they are across the street or miles inland. Because warehousing and terminal operation functions are labor-intensive, small differences in the cost of labor among competitors can make large differences in the competitive positions of the affected companies.[50] As the Department of Labor itself has recognized,[51] and as is explained in more detail in the *amicus curiae* brief of the National Association of Stevedores, the Department of Labor's interpretation of the 1972 amendments to the Act has resulted in very substantial increases in the cost of labor for covered "employers." These increased costs, to the extent that they reflect compensation for stuffing and stripping-related injuries based solely on the arbitrary criterion of situs, tend to distort the relative operating costs of essentially identical companies, thereby disrupting the competitive structure of the industry. It seems highly unlikely that Congress, in dealing with the anomaly created by a situs line at the water's edge, intended to adopt a coverage test which gives rise to still greater disparities between the two sides of the marine terminal fence.

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[50] In some ports, insurance is the single most important element of stevedoring costs, after direct labor. Cooper and Co., "A Causal Study of Accidents in the Longshoring Industry," prepared for the Department of Labor, Occupational Safety and Health Administration, Division of Program Evaluation and Research (Dec. 1, 1975) at 10.

[51] *OWCP Task Force Report* at 75 *et seq.*

Similarly, it should be recognized that the extension of the Act's coverage to container stuffing and stripping logically requires the extension of coverage to certain intermediate activities which Congress could not have intended to include within the definition of "maritime employment." Thus, for example, if Blundo was engaged in "maritime employment" at the time of his injury, then it follows that the truckdriver who picked up the container at the marshalling yard and delivered it to the 19th Street pier was also engaged in maritime employment. This truckdriver, a member of the Teamsters' Union and an employee of an independent trucking firm, would therefore be covered under the Act as a "longshoreman or other person engaged in longshoring operations" during all times that he is on a covered situs.[52] Congress cannot be held to have intended a result so plainly contrary to the ordinary concept of "maritime employment". It must be concluded, therefore, that the activity covered by the Act ends at the point of rest, before further transshipment by truck or otherwise. This interpretation is supported by express language in the legislative history of the 1972 amendments:

> Thus, employees whose responsibility is only to pick up stored cargo for further trans-shipment would not be covered. * * * [*H.R. Rep. No. 1441, supra* at 11; *S. Rep. No. 1125, supra* at 13.]

5. *At the time of his injury Blundo was not engaged in the unloading process.*

The foregoing discussion of the longshore function of loading and unloading vessels helps to place in context the activity in which Blundo was engaged at the time of his injury.

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[52] The apparently non-maritime nature of the truckdriver's employer would not exclude coverage, since the amended Act's definition of employer is phrased in such a way as to cover any employer of a covered "employee." Therefore, if the truckdriver is covered, the trucking firm is an "employer" under the Act. *Jacksonville Shipyards* v. *Perdue, supra* at 538, n. 9.

Blundo was a checker, and had been employed as such for five years prior to his injury. As described previously, these duties are essentially clerical, and do not require the physical handling of cargo which characterizes the work of longshoremen.

Because of the special nature of their duties, checkers have traditionally been set apart from other waterfront occupations. For example, in many ports checkers belong to a separate clerks or checkers union local,[53] and throughout the United States checkers are separately rated for insurance purposes.[54] In industry practice, moreover, the checker is not considered a logshoreman, and is typically not a member of a longshore gang although he may at times work directly with the gang in the loading or unloading process.[55] Although Blundo's duties as a checker occasionally took him aboard vessels (A. 65), there is no evidence that Blundo ever engaged in what the court below has termed "the typical longshoring activity of taking cargo on or off a vessel." [56]

Blundo's testimony as to the general nature of his duties, although limited, is consistent with the description of industry practices set forth above. For example, Blundo testified that his assignment on a particular day may be as a "ship's checker" (stevedore function), or "on the pier" (terminal function) (A. 65). When assigned as a "ship's checker," Blundo is not reassigned to other duties on the pier but remains with the ship until the loading or unloading function is completed (A. 68).

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[53] *See, e.g.*, NAS Mem. A. 34a-35a (Miami).

[54] *See* National Council on Compensation Insurance, *Workmen's Compensation and Employer's Liability Insurance Manual* (1934, as amended through Jan. 1, 1977).

[55] *See* Groom, *Hiring Practices for Longshoremen*, 88 Monthly L. Rev. 1289 n.1 (1965); *Rubin and Swift* at 10.

[56] Pet. A. 40a.

On the day of his injury Blundo was assigned "on the pier" to work as a checker in the terminal function of stripping containers (A. 68). The stripping took place at ITO's 19th Street stripping and stuffing station in Brooklyn. Blundo was not working on a ship or even near a ship that day. In fact, the 19th Street pier to which Blundo was assigned is never used by ITO, or by anyone else, for loading or unloading vessels.

The only use of the 19th Street pier was as a warehouse for storage of cargo previously unloaded from a vessel or vessels at any one of a number of other facilities. Blundo was working inside the warehouse when he was injured. The incoming cargo which Blundo was checking at the time of his injury was to be stored at the warehouse until it was cleared by United States Customs and picked up by the consignee or his agent.

There is no doubt that the container which Blundo was checking at the time of his injury had previously been unloaded from a vessel at a container facility by a longshore gang. Blundo, however, was not a member of that gang, did not work at that facility, and did not participate in unloading that vessel. In fact, so far removed was Blundo from the process of unloading that vessel that he did not know the name of the vessel or its owner, or where the vessel was unloaded, or by whom it was unloaded, or even when it was unloaded (A. 81-82, 96).

The function which Blundo was performing at the time of his injury did not begin until long after, perhaps as much as a week after, the container had been unloaded and placed at rest in the container marshalling yard at the unloading terminal. Given the tenuous connection between Blundo's injury and the unloading of a vessel, it would plainly be contrary to industry practice and the intent of Congress to extend coverage to Blundo as an employee engaged in "maritime employment."

C. *The definition of coverage advanced herein is based on principles consistently applied by this Court and lower federal courts in interpreting the scope of the Act.*

It is not possible to consider or interpret the coverage provisions of the present Act without reference to the long history of decisions by this Court, and legislative changes enacted by Congress in response to those decisions, which preceded the 1972 amendments. As has been previously explained, the 1972 coverage amendments themselves represented Congress' response to two major decisions of this Court which, taken together, had placed definite limits on the ability of longshoremen to pursue a federal remedy for injuries incurred on the pier in connection with loading or unloading a vessel. *Nacirema Operating Co.* v. *Johnson, supra*; *Victory Carriers, Inc.* v. *Law, supra.*

The *Nacirema* and *Victory Carriers* decisions are the most recent in a long line of decisions in which this Court has attempted to reconcile certain substantive principles which have competed for predominant consideration in the interpretation of the Act. As will be shown below, there are three major considerations which have inspired Congress in its development of the Act, and which have guided this Court in interpreting the Act. These are:

(1) the need for a system of federal longshoremen's compensation which is consistently applicable to a category of maritime workers whose federal "status" is defined functionally, in terms of their individual employment or activity;

(2) the need for a system which is uniformly applicable in all parts of the United States;

(3) the desirability of a clear test of federal coverage.

Most problems which have arisen in the interpretation of the Act may in general terms be viewed as the result of conflict between, on the one side, the objectives of certainty and geographic uniformity, and, on the other side, the objective of confining or extending the Act's coverage to workers actually engaged in federal maritime employment. The history of the Act before 1972, both in Congress and before this Court, reflects a strong emphasis on the importance of certainty and geographic uniformity in the application of the Act. Accordingly, although the 1972 coverage amendments expressly established employment "status" as a controlling test of coverage, that test should to the maximum extent possible be applied in a manner which is consistent with the other basic principles of the Act.

When this Court first designated the water's edge as the demarcation between the state and federal workmen's compensation laws it made explicit its purpose to preserve "a system of [federal maritime] law coextensive with, and operating uniformly in, the whole country." [57] The Court concluded that if State workmen's compensation statutes were allowed to apply to injuries incurred on navigable waters, the result would be "destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish * * *." [58] The Court struck down the New York State statute, leaving no compensation remedy at all for injuries incurred on navigable waters.

During the decade between the *Jensen* decision and the enactment of the first Longshoremen's and Harbor Workers' Compensation Act in 1927, the so-called *Jensen* line withstood two attempts by Congress to fill the com-

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[57] *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205, 215 (1917), quoting from *The Lottawanna*, 88 U.S. (21 Wall.) 558 (1874).

[58] 244 U.S. at 217.

pensation void with federal statutes extending state workmen's compensation remedies to injuries incurred on the seaward side of the line. In each case, this Court held the federal statute invalid on the ground that it failed to preserve the uniformity required by the Constitution in maritime matters.[59] In the meantime, the inability of Congress to fill the void left by the *Jensen* decision made it necessary for this Court to explore further the dividing line which delimits exclusive federal maritime jurisdiction. The Court did so in a series of decisions, referred to as the "maritime but local" line of cases, in which certain categories of employment were held to be subject to state jurisdiction even when performed on the navigable waters of the United States. *See, e.g., Western Fuel Co.* v. *Garcia*, 257 U.S. 233 (1921); *Grant Smith-Porter Ship. Co.* v. *Rohde*, 257 U.S. 469 (1922).

The "maritime but local" cases mark the first attempt to define federal maritime jurisdiction in terms of the character of activity or employment giving rise to the injury. As such, they represent a partial triumph of the "activity" approach to coverage, at the expense of the objective of a uniform maritime jurisdiction, predictable and certain in its application. Almost from the beginning courts found the "maritime but local" distinction difficult to apply, and its uncertain contours confounded

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[59] *Knickerbocker Ice Co.* v. *Stewart*, 253 U.S. 149 (1920); *Washington* v. *Dawson Co.*, 264 U.S. 219 (1924):

> And so construed, we think the enactment is beyond the power of Congress. Its power to legislate concerning rights and liabilities within the maritime jurisdiction and remedies for their enforcement, arises from the Constitution, as above indicated. The definite object of the grant was to commit direct control to the Federal Government; to relieve maritime commerce from unnecessary burdens and disadvantages incident to discordant legislation; and to establish, so far as practicable, harmonious and uniform rules applicable throughout every part of the Union. [253 U.S. at 164, cited in *Dawson* at 264 U.S. 225.]

many an injured waterfront worker forced to decide, sometimes irrevocably, whether to pursue the federal or state compensation remedy.

Although the "maritime but local" distinction ultimately survived for over forty years, during the entire time it was restricted by Acts of Congress and decisions of this Court.[60] Finally, in 1962 the Court eliminated the "maritime but local" distinction altogether on the ground that the 1927 Longshore Act had superseded it. In so doing, the Court expressly recognized the difficulty which courts had had in applying the distinction:

> Meanwhile the Court handed down a number of decisions which appeared to modify *Jensen* by permitting States to apply their statutes to some maritime injuries. But we must candidly acknowledge that the decisions between 1917 and 1926 produced no reliable determinant of valid state law coverage.
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> * * * *
>
> No dependable definition of the area—described as "maritime but local," or "of local concern"—where state laws could apply ever emerged from the many cases which dealt with the matter in this and the lower courts. The surest that could be said was that any particular injury might be within the area of "local concern," depending upon its peculiar

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[60] The enactment of the first federal Longshore Act in 1927 removed much of the impetus for further expansion of the doctrine with respect to state compensation statutes. Later, the Court defended the *Jensen* line against encroachment by other federal compensation statutes, in a decision holding that the Longshore Act was the exclusive remedy for a railroad worker injured on navigable waters. *Nogueira* v. *New York, New Haven & Hartford R.R. Co.*, 281 U.S. 128 (1930). This holding was confirmed twenty-three years later in *Pennsylvania R.R. Co.* v. *O'Rourke*, 344 U.S. 334 (1953).

In 1942 the Court made the difficult "maritime but local" decision less agonizing by recognizing a "twilight zone" which (in effect if not in legal theory) gave federal and state compensation statutes concurrent jurisdiction over many activities *Davis* v. *Department of Labor*, 317 U.S. 249 (1942).

> facts. In numerous situations state acts were considered inapplicable because they were thought to work material prejudice to the characteristic features of the general maritime law, particularly in cases of employees engaged in repair work. On the other hand, awards under state compensation acts were sustained in situations wherein the effect on uniformity was often difficult to distinguish from those found to be outside the purview of state laws. [*Calbeck* v. *Travelers Ins. Co.*, 370 U.S. 114, 118, 119 (1962); footnotes omitted.]

In returning to the *Jensen* line as the test of coverage under the Act, the Court in *Calbeck* reaffirmed the principles of geographical uniformity and certainty as basic underpinnings of the Act:

> In sum, it appears that the Longshoremen's Act was designed to ensure that a compensation remedy existed for all injuries sustained by employees on navigable waters, and to avoid uncertainty as to the source, state or federal, of that remedy. Section 3 (a) should, then, be construed to achieve these purposes. [370 U.S. at 124.]

Seven years later, when the *Nacirema* Court was asked to extend federal coverage under the Act *shoreward* across the *Jensen* line, it declined to do so in part because the extension would create uncertainty:

> There is much to be said for uniform treatment of longshoremen injured while loading or unloading a ship. [But] * * * construing the Longshoremen's Act to coincide with the limits of admiralty jurisdiction—whatever they may be and however they may change—simply replaces one line with another whose uncertain contours can only perpetuate on the landward side of the *Jensen* line, the same confusion that previously existed on the seaward side. [396 U.S. at 223.]

The strict situs test reaffirmed in *Calbeck* and *Nacirema* was fully consistent with the terms of the Act as it

then stood.[61] Before 1972 the Act contained no provision which expressly defined an activity, employment, or "status" of maritime employment which would qualify an injured worker to receive federal benefits. The absence of an express provision, however, is no indication that "status" was insignificant to the purpose of the Act. Other provisions of the Act, operating together, had the effect of approximating a "status" requirement, for in most instances it may be inferred that an "employee" [62] working on "navigable waters" [63] "in the course of [his] employment" [64] for a "maritime" employer [65] is himself engaged in maritime employment. Although there were occasions when the inference seemed weak,[66] for the most part courts did not seem troubled by the potential over-inclusiveness of the strict situs test.

It took *Nacirema*, a celebrated instance of the Act's under-inclusiveness, to prompt Congress to amend the Act's coverage provisions in 1972. The effect of the 1972 amendments is to sacrifice some of the stark clarity of the *Jensen* line for a coverage test which although still well-defined, more accurately conforms to the actual activity of longshoremen on the waterfront.[67] That new

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[61] *See* footnote 6, *supra*.

[62] 33 U.S.C. § 902(3).

[63] 33 U.S.C. § 903(a).

[64] 33 U.S.C. § 902(2).

[65] 33 U.S.C. § 902(4).

[66] *See Pennsylvania R.R. Co.* v. *O'Rourke*, *supra* at 342 (Minton, J., dissenting).

[67] It is significant that in the same year this Court also abandoned the strict "navigable waters" dividing line which had formerly defined federal admiralty and maritime tort jurisdiction, replacing it with a requirement that an injury arise from "traditional maritime activity." *Executive Jet Aviation, Inc.* v. *City of Cleveland*, 409 U.S. 249 (1972):

> In sum, there has existed over the years a judicial, legislative, and scholarly recognition that, in determining whether

"status" test appears in the form of definition of an employee as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations * * *."

The 1972 coverage amendments should be construed in light of this Court's warning in *Nacirema* that shoreward extension of the Act's coverage, if not delimited by clear and recognizable boundaries, would "perpetuate on the landward side of the *Jensen* line, the same confusion that previously existed on the seaward side." 396 U.S. at 223. The fact is that Congress did put limits on the shoreward extension of coverage, and those limits are plainly expressed in the Act and in the legislative history of the amendments. Although Congress might easily have extended the Act's coverage to the limits of admiralty jurisdiction, or to new categories of persons not

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there is admiralty jurisdiction over a particular tort or class of torts, reliance on the relationship of the wrong to traditional maritime activity is often more sensible and more consonant with the purposes of maritime law than is a purely mechanical application of the locality test.

* * * *

It is far more consistent with the history and purpose of admiralty to require also that the wrong bear a significant relationship to traditional maritime activity. [409 U.S. at 261, 268.]

The United States Court of Appeals for the Ninth Circuit has recently applied the *Executive Jet* rationale in a Longshoremen's Act coverage case under the 1972 amendments. *Weyerhaeuser Co.* v. *Gilmore, supra*, 528 F.2d at 961. The Ninth Circuit held that a pondman injured at a waterfront sawmill was not engaged in maritime employment and stated:

> We hold that for an injured employee to be eligible for federal compensation under LHCA, his own work and employment, as distinguished from his employer's diversified operations, including maritime, must have a realistically significant relationship to 'traditional maritime activity involving navigation and commerce on navigable waters,' with the further condition that the injury producing the disability occurred on navigable waters or adjoining areas as defined in Sec. 903. *See Executive Jet Aviation, Inc.* v. *City of Cleveland*, 409 U.S. 249 (1972) [other citations omitted.]

directly involved in the activity of loading and unloading ships, it clearly did not do so. Instead, Congress enacted provisions designed to meet the specific need pointed out by the *Nacirema* case for "uniform treatment of longshoremen injured while loading or unloading a ship." 396 U.S. at 223.

The new "status" test deliberately fashioned by Congress to accomplish that end cannot therefore be "read out of the Act," as the court below concedes it has virtually done.[68] Moreover, the history of the Act's development and interpretation by this Court makes it impossible to ignore the principles of certainty and geographical uniformity which are inherent in the Act's purpose. In evaluating any proposed interpretation of the new "status" provision, therefore, all three of the following questions should be addressed:

> (1) whether the interpretation of "status" is consistent with the general employment activity or function which Congress meant to cover and the practical divisions of labor on the waterfront;
>
> (2) whether the interpretation of coverage may be applied with certainty and without expensive litigation, by employees, employers, and insurance companies involved in waterfront activity; and
>
> (3) whether the interpretation will result in uniform coverage of employees engaged in similar activities at different locations.

As discussed previously, the interpretation of "status" advanced on behalf of the petitioner herein is the only interpretation consistent with Congressional intent and with the practical divisions of labor on the waterfront. This interpretation of coverage is also far more conducive to certainty and geographic uniformity of application

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[68] Pet. A. 40a.

than the tests of coverage formulated by the court below or by some other Courts of Appeals.

The coverage definition advanced herein may be understood and applied with consistency and certainty by those most affected by it (the longshoremen and their stevedore employers) because it is a definition which is based on familiar industry practice. The distinction between stevedoring and terminal operations, the structure and operation of the longshore gang, the significance of point of rest in the loading and unloading process—these are all concepts which longshoremen and stevedores work with daily in ports throughout the United States. Moreover, these are concepts which are inherent in the activity which Congress meant to cover under the Act: the activity of loading and unloading vessels.

The same consistent conception of the loading and unloading process appears in the decisions of lower federal courts which have been called upon to define that concept in other cases involving injuries to longshoremen. A brief recitation of the facts of a number of cases in which the injured employee was determined to have been involved in the loading or unloading process will demonstrate the similarity:[69]

1. In *Hagans* v. *Ellerman & Bucknall S.S. Co.*, 318 F.2d 563 (3d Cir 1963), the injured longshoreman was a member of a "regular gang" of twenty-two longshoremen, eight of whom worked in the hold of the ship. The rest, including Hagans, worked on the pier. [318 F.2d at 565.][70]

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[69] These cases arose in connection with the "seaworthiness" doctrine, under which recovery is allowed for certain injuries incurred in the service of a ship. The 1972 amendments eliminated the "seaworthiness" remedy for longshoremen covered by the Act.

[70] Hagans' duties were described by the Third Circuit as follows:

> He was unloading bags of sand from the motor towed trucks and placing them in their *first immobile resting place ashore.*

2. In *Thompson* v. *Calmar S.S. Corp.*, 331 F.2d 657 (3d Cir.), *cert. denied*, 379 U.S. 913 (1964), the injured longshoreman was a member of a stevedoring company's gang of longshoremen employed to load shipments of steel aboard a vessel lying anchored in navigable waters. The steel was being loaded directly into the vessel from gondola freight cars in which it had been shipped and which were on the pier alongside the vessel.

3. In *Spann* v. *Lauritzen*, 344 F.2d 204 (3d Cir.), *cert. denied*, 382 U.S. 938 (1965), the injured longshoreman was a member of a gang engaged in unloading a bulk cargo of nitrate of soda from a vessel by means of shorebased crane and hopper. The crane lifted buckets of nitrate from the hold of the vessel into the hopper, which then discharged the nitrate in five-bucket truckloads into trucks waiting under the hopper. The longshoreman, who was operating the hopper, was injured when a bucket load of nitrate was dropped into the hopper.

4. In *Garrett* v. *Gutzeit O/Y*, 491 F.2d 228 (4th Cir. 1974), the plaintiff, a longshoreman, was a member of a gang of longshoremen employed in connection with the discharge of the cargo of pulp paper.[71]

They were the same bags handled by his fellow longshoremen who had started the process of discharge of the cargo in the hold of the vessel. The pier apron could not contain the large number of bags which, in any event, had to be protected from the weather, by being placed within the pier building. The conclusion is inescapable that Hagans performed an integral part of the unloading of the vessel and thus as a matter of law he was in the ship's service. [318 F.2d at 571; emphasis added.]

[71] At 8:00 A.M. the longshoremen began unloading the cargo. As is customary in the stevedoring industry the gang was divided into functional work groups; some were ordered to work on the ship while various duties were assigned to others on the pier. [Plaintiff] and others were to stack the cargo as it was

5. In *Chagois* v. *Lykes Bros. S.S. Co.*, 432 F.2d 388 (5th Cir. 1970), *rev'd on other grounds on motion for reconsideration*, 457 F.2d 343 (5th Cir.), *cert. denied*, 409 U.S. 1012 (1972), the injured longshoreman was a member of a gang of longshoremen assigned to load bulk rice from railroad boxcars on the pier into the hold of the vessel.

6. In *Pope & Talbot, Inc.* v. *Cordray*, 258 F.2d 214 (9th Cir. 1958), the injured worker was the foreman of a longshore gang working on the dock in conjunction with another gang working aboard a vessel during the unloading process.[72]

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delivered to them by other members of the "dock gang" in a storage shed located on the pier.

* * * *

* * * The cargo was removed from the ship in the customary manner. Once the cargo was removed from the ship's hold and placed on the dock the bales would be disconnected from the ship's gear. Members of the "dock gang" then moved the bales one at a time via hand trucks into a shed on the pier some twenty-five or more feet from the side of the ship. [Plaintiff's] work gang was instructed to stack the bales four high as they arrived in the shed. The cargo was transferred from the pier apron and stacked in the shed to facilitate the removal of more bales from the hold. [491 F.2d at 230.]

[72] It was one of Cordray's duties to see that the cargo was moved to its *first place of rest* from the ship's tackle, and it was his duty also to coordinate the activities of the dock working longshoremen with those of the ship working longshoremen * * *. [258 F.2d at 215.]

* * * *

Under the testimony, he was coordinating the unloading of the cargo from the ship's hold to its place of rest on the dock. We hold that the duty of providing a seaworthy ship and gear at the time of this accident extended to the appellee, whether or not appellee was on board the ship or on the dock. The test is, what was the nature of his work? He was performing a service for the ship in the discharge of its cargo. His employer was under contract with the shipowner to take the cargo from the shipside and to put it in a place of storage, and appellee was engaged in the performance of this work. [258 F.2d at 217-18; emphasis added.]

7. In *Gebhard* v. *S.S. Hawaiian Legislator*, 425 F.2d 1303 (9th Cir. 1970), the injured worker was a " 'marine clerk longshoreman' whose duty station was at ship's side near a pier-based crane." His role in the loading operation was to position, in proper sequence, the straddle carriers under the crane. The containers left by the straddle carriers were then lifted directly onto the ship by crane.

8. In *McNeil* v. *A/S Havtor*, 326 F. Supp. 226 (E.D. Pa. 1971), *rev'd on other grounds on motion for reconsideration*, 339 F. Supp. 1264 (1972), the injured worker was a member of a longshore gang engaged in loading a vessel. His job in the gang was to operate a squeeze lift truck in the confines of a warehouse or pier shed.[73]

9. In *Litwinowicz* v. *Weyerhaeuser S.S. Co.*, 179 F. Supp. 812 (E.D. Pa. 1959), the injured workers were longshoremen engaged in the activity of loading steel onto a vessel.[74]

The facts of the foregoing "loading/unloading" cases illustrate the consistency with which lower federal courts have approached the definition of the loading and un-

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[73] Libellant himself did not go aboard defendant's vessel to physically place the cartons on shipboard. However, other longshoremen in the same gang using fork lift trucks transferred the pallets which libellant loaded from the pier to the ship's side. Thereafter, ship's tackle lifted the cargo aboard for storage and ultimate sea carriage. [326 F. Supp. at 227.]

[74] The fact remains, however, that plaintiffs were engaged in the work of loading * * *. It is of no moment that the draft was raised and then lowered onto chocks before it began its upward and lateral movement into the ship. The term loading is not a word of art, and is not to be narrowly and hypertechnically interpreted. Plaintiffs' actions at the time of the accident were direct, necessary steps in the physical transfer of the steel from the railroad car into the vessel, which constituted the work of loading. [179 F. Supp. at 817-18.]

loading process.[75] Cases in which the injured worker was determined *not* to have been involved in the loading or unloading process are equally instructive.[76]

It cannot be presumed that when Congress enacted the 1972 coverage amendments it was simply ignorant of these decisions defining "loading" and "unloading" of vessels in the context of federal jurisdiction over longshore injuries. Indeed, since these decisions were rendered in connection with the "seaworthiness" doctrine, and

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[75] *See also Brock* v. *Baroid Div. of Nat'l Lead Co.*, 339 F. Supp. 728 (W.D. La. 1972) ("roustabout" employed by a drilling company injured while unloading a vessel which had brought supplies to drilling platform); *Byrd* v. *American Export Isbrandtsen Lines, Inc.*, 300 F. Supp. 1207 (E.D. Pa. 1969) (longshoreman injured while engaged in an attempt to move a forklift truck from the back to the front of the pier during the loading operation); *McCross* v. *Ratnakar Shipping Co.*, 265 F. Supp. 827 (D. Md. 1967) (seven cases involving employees of stevedoring companies injured while engaged in the physical activity of taking cargo on or off a vessel); *Calderone* v. *Naviera Vacuba S/A*, 204 F. Supp. 783 (S.D. N.Y. 1962), *aff'd*, 325 F.2d 76 (2d Cir. 1963) (checker directly involved in the process of loading and unloading a vessel).

[76] *See, e.g., Young* v. *Chevron Oil Co.*, 314 F. Supp. 1278 (E.D. La. 1970), in which a "roustabout" was injured "while transferring cargo off the wharves after it had been unloaded from a vessel":

> While Young claims he was injured in the "unloading operation" and claims that the transfer of discharged cargo is an "integral part" of the unloading operation, the cargo had already been unloaded from the supply boat by another crew using another crane at least one hour before he tried to clear the dock * * *.
>
> * * * *
>
> The transfer of cargo subsequent to the actual unloading of the vessel is an indispensable part of the process of getting it moved from the port of shipment to its ultimate destination, but this act is not sufficiently connected with the unloading of a vessel to make it a part of the seaman's work. [314 F. Supp. at 1281.]

See also Lassiter v. *United States Lines, Inc.*, 370 F. Supp. 427, 432 (E.D. Va. 1973) (longshoreman injured while stripping a container which had been unloaded from a vessel more than sixty days previously held "not injured while loading or unloading a vessel.")

since the elimination of the "seaworthiness" doctrine with respect to longshoremen was the primary subject of testimony before both the Senate and House Committees in 1972 and is one of the main features of the amendments as enacted, it is reasonable to conclude that Congress meant to replace the discarded "seaworthiness" remedy with a compensation remedy of the same general scope. At a minimum, the close connection between the "seaworthiness" and compensation remedies makes it likely that Congress had in mind similar definitions of "loading" and "unloading" with respect to both.

The concept of loading and unloading advanced herein and in the seaworthiness cases summarized above would promote not only certainty and predictability, but also geographic uniformity in the application of the Act to the various ports of the United States. As noted above in the discussion of industry practice in the stevedoring and marine terminal industry, the point of rest on the pier to which cargo is unloaded from a vessel by the longshore gang marks the last real point at which it is possible to generalize about cargo-handling practices among ports, or even among different facilities of the same port.

For example, the present ILA collective bargaining agreement in the Port of New York, which was in existence at the time of Blundo's injury, provides that "* * * stuffing and stripping [of containers] shall be performed on a waterfront facility, pier or dock." [77] Thus, under the holding of the court below, the basis for Blundo's meeting the "situs" requirement of the Act was a work-preservation provision in a labor contract, not anything inherent in the nature of his function. A worker injured while performing the same function as Blundo

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[77] Rule 2, "Rules on Containers", as cited in *ILA, AFL-CIO* v. *NLRB*, 79 L.C. ¶ 11,496 at 21,168 (2d Cir. 1976), *cert. denied*, 45 U.S.L.W. 3463 (Jan. 11, 1977).

at some other port not covered by the Rules on Containers would not necessarily meet the "situs" requirement as that requirement has been interpreted by the court below. Thus, even among terminal employees performing the same function the coverage of the Act would depend on the terms of the local collective bargaining agreement. In another context the court below recognized that such a result is unacceptable:

> Obviously it is not enough that * * * a longshoreman's union in a particular port has forced employers to hire its members for such unlongshoreman-like positions as clerks or guards. [Pet. A. 33a.]

The possibility of wide variations among ports in the application of the Act is not merely speculative. Statistics recently published by the OWCP demonstrate clearly that there have been major differences among ports in the impact of the 1972 coverage amendments. Thus, in fiscal year 1976 the "Extended Coverage" of the 1972 amendments accounted for 79% of reported injuries in Baltimore, 73% in Norfolk, and 76% in Houston, compared to only 31% in New Orleans, 28% in San Francisco, and 27% in Honolulu.[78]

D. *An "employee" must be engaged in "maritime employment" at the time of injury.*

The statutory definition of "employee" requires that an individual covered by the Act must be "engaged in maritime employment." § 902(3). As demonstrated *supra*, Blundo's work in removing cargo from containers unloaded several days previously and transported over public streets by a trucking company cannot be considered "maritime employment" or "loading or unloading", as those terms have traditionally been defined. Blundo can satisfy the status requirement of the amendments only if his infrequent work aboard vessels (some

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[78] Pet. A. 130a.

20% of his time) is sufficient to make him a "longshoreman" covered by the Act whatever his duties at the time of injury.

The legislative history of the amendments makes it clear, however, that the status test requires examination of the maritime nature of the claimant's employment *at the time of injury* and cannot be satisfied by some general characterization based upon union membership or previous employment. The Committee Reports from both the House and Senate state the Congressional intent that the Act should not reach "employees who are not engaged in loading, unloading, repairing or building a vessel just because they are injured in an area adjoining navigable waters used for such activity." *H.R. Rep. No. 1441, supra* at 11; *S. Rep. No. 1125, supra* at 13. The same point was later made by Representative Steiger in floor debate on the 1972 amendments when he stated that "even if an employee does not happen to be over navigable waters at the time he is injured, he will be covered *as long as he is working as a longshoreman or harborworker, whether engaged in repairing a vessel or unloading it.*" 118 Cong. Rec. 36385 (1972) (emphasis added).

Relying on these firm indicia of Congressional intent, three Courts of Appeals, although at odds over other features of the Act, have all agreed that a covered employee must be actually engaged in "maritime employment" at the time of injury in order to recover. *See Weyerhaeuser Co.* v. *Gilmore, supra; Adkins* v. *I.T.O. Corp., supra;* and *Jacksonville Shipyards* v. *Perdue, supra.*

These holdings are in accord with the construction given the Act prior to the 1972 amendments. In *Pennsylvania R.R. Co.* v. *O'Rourke, supra* at 340, this Court stated with regard to the broader pre-1972 "status" requirement that "[a]n injured worker's particular activity at the time of injury determines of course whether

he was injured in the course of his employment * * * and whether he was a member of the crew of the vessel * * *". Moreover, the Court of Appeals for the Second Circuit has previously held, in connection with the broader "status" requirement of the Act which existed prior to 1972, that an employee's duties at the time of his injury determined coverage under the Act:

> The employee's duties on the day of the accident are the critical facts which should determine his status as a member of the tug's crew. It is true that if he had been called aboard for a single act of service, he might not become a member of the crew. But on the days when his employer assigned him to serve as "mate" of the vessel, we hold that he was a crew member, although he might cease to be one on days when he was assigned for other duties. We can perceive no reason in the words or purpose of the Compensation Act for lumping an employee's activities over the period of his employment and classifying him according to the greater number of days on which he was either seaman or longshoreman. [*Long Island R. Co.* v. *Lowe*, 145 F.2d 516, 518 (2d Cir. 1944).]

Furthermore, this construction is supported by precedents established by this Court in construing a similar "employee" definition in the Federal Employers' Liability Act. As enacted in 1908, the FELA made railroads liable "to any person suffering injury while he is employed by such carrier in [interstate] commerce." 35 Stat. 65. In construing the requirement that the employee be "employed in interstate commerce," this court held in numerous cases that work done at other times was immaterial. *E.g.*, *Chicago & N.W. Ry. Co.* v. *Bolle*, 284 U.S. 74 (1931); *Erie R.R. Co.* v. *Welsh*, 242 U.S. 303 (1916).[79]

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[79] The statute was later amended to cover all employees any part of whose duties were in furtherance of interstate commerce or had a direct or substantial bearing thereon, 45 U.S.C. § 51, but the "maritime employment" criterion is so similar to the "interstate com-

The at-time-of-injury interpretation also accords with the overriding concern of witnesses at Congressional hearings and of members of Congress with the particularly hazardous nature of the longshoreman's work. *See, e.g.*, 118 Cong. Rec. 36387 (Rep. Hicks); 118 Cong. Rec. 36388 (Rep. Ashley). The repeated emphasis upon the hazards of unloading a vessel makes it unlikely that Congress intended to cover employees engaged in activity which does not encompass any of the risks that make longshoring work one of the most dangerous occupations in the country. *See S. Rep. No. 1125, supra* at 2. Blundo's occupation on the day and at the time of his injukry involved none of these peculiar hazards of traditional longshore work, and coverage under the Act should not be extended to him on the ground that on other occasions he may have worked with longshore gangs in the actual loading and unloading of ships.

The court below has held that a worker not engaged in "maritime employment" at the time of his injury may nevertheless be covered by the Act if the worker at other times has "spent a significant part of his time in the typical longshoring activity of taking cargo on or off a vessel." (Pet. A. 39a-40a.) Quite apart from the difficulty of determining what amounts to a "significant part" of an employee's time, this holding would destroy the uniformity sought by the Act because it would result in a denial of federal coverage to an employee working side by side at the same job with another employee whose "significant" involvement at other times in "taking cargo on or off a vessel" makes him eligible for federal coverage.

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merce" requirement of the original version of the FELA that these FELA cases stand as persuasive authority for a construction of the "employee" status that limits recovery to persons engaged in maritime employment at the time of injury. Any other interpretation would lead to ridiculous results, with longshoremen covered at places and times having absolutely no relationship to their maritime work.

Moreover, as phrased by the court below, the test of coverage would evidently not be satisfied in the case of a worker who spends a "significant part of his time" stuffing and stripping containers, since that function does not qualify as "the typical longshoring activity of taking cargo on or off a vessel." This result, although correct under the test of coverage advanced herein, seems wholly inconsistent with the court's own holding with respect to Blundo that stuffing and stripping of containers is "maritime employment."

II. Blundo was not injured at a "situs" covered by the Act.

As discussed *supra*, the 1972 amendments were enacted to abrogate the rigid "water's edge" limitation of federal coverage which had been recently reaffirmed by this Court in *Nacirema* and *Victory Carriers*. The situs at which an injury must occur in order to be compensable, which had previously been restricted to navigable waters and "any dry dock", was expanded to

> * * * any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel.

Despite the landward extension, a covered site must still have some immediate connection with traditional longshore work on and around ships, a requirement emphasized by the statement in the Committee Reports of both Houses of Congress that the purpose of the shoreward expansion was to eliminate the possibility that federal coverage of a longshoreman would "depend on the fortuitous circumstance of whether the injury occurred on land or over water." *H.R. Rep. No. 1441*, *supra* at 10; *S. Rep. No. 1125*, *supra* at 13.

The exact nature of the expanded situs requirements has, however, been the source of considerable dispute in

the Courts of Appeals which have construed the 1972 amendments. The court below indicated that it believed the statute could be read to cover *any* pier, wharf, etc. adjoining navigable waters, whatever the nature of the work customarily performed thereon. Pet. A. 30a, n.19, relying on *I.T.O. Corp.* v. *Benefits Review Bd., supra*, 529 F.2d at 1083-84.

The Third Circuit has held that the exent of the Act's coverage is "functional not spatial" and that the enumeration of covered areas is not exclusive. *Sea-Land Service, Inc.* v. *Director, Office of Workmens' Compensation Programs, supra.* Two other Courts of Appeals have held that the "customarily used" requirement applies to all situs descriptions preceding it, rather than merely modifying "other adjoining area." *Jacksonville Shipyards, Inc.* v. *Perdue, supra.* The recent OWCP Task Force Report of the Department of Labor gives the statute the same reading, holding that

> the "situs" test requires that the injury must occur upon the navigable waters or in an adjoining area customarily used by an employer in loading, unloading, repairing, building, or breaking a vessel. [*OWCP Task Force Report* at 9.]

Both the structure of the statute and the legislative history support this reading of the situs requirement.

As a matter of internal construction, the use of "*other* adjoining area customarily used" demonstrates an intent that this qualifying clause apply to all covered sites. Otherwise, it would have been sufficient for Congress to have concluded the list of designated sites with the general statement, "or any adjoining area customarily used * * *." The choice of "*other* adjoining area customarily used" implies strongly that the specifically designated sites, like those included in the general description, can encompass only locations normally used in loading, unloading, building or repairing a vessel.

Furthermore, the statute imposes liability on an employer only if it has employees "engaged in maritime employment, in whole or in part," upon a situs covered by the Act. The term "maritime employment" should be construed in the Act as including only activities, such as loading and unloading, with "a realistic relationship to the traditional work and duties of a ship's service employment," *Weyerhaeuser* v. *Gilmore, supra*, 528 F.2d at 961. If maritime employment must be carried on by an employee at a covered site before an employer is liable to pay compensation under the Act, a consistent interpretation of the statute demands that the restriction to the maritime acivities of "loading, unloading, repairing or building a vessel" be applied to all sites covered by the Act and not merely to "other adjoining areas." [80]

The legislative history of the shoreward extension of the Act supports such a reading of the statute. The Senate Committee Report states that "[t]he bill also expands the coverage of this Act to cover injuries occurring in the contiguous dock area related to longshore and ship repair work," thus implying that the "customarily used" qualification is applicable to any covered situs. *S. Rep. No. 1125, supra* at 2. Furthermore, in discussing the scope of the shoreward extension, the Committee Reports of both Houses expressed the Congressional intent not to cover those persons not engaged in loading, unloading, repairing or building a vessel "just because they are injured in an area adjoining navigable waters *used for such activity*." *Id.* at 13; *H.R. Rep. No. 1441, supra* at 11 (emphasis added). If any pier adjoining navigable

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[80] *Cf. Pacific Coast Longshore Agreement* (July 1, 1975) File No. 5424, U.S. Dept. of Labor, Bureau of Labor Statistics, Office of Wage and Industrial Relations, Division of Industrial Relations, at 2, which covers the movement of cargo so long as it is "at a dock" and under the control of an employer covered by the contract. "Dock" is expressly stated not to include any facility at which vessels do not moor. *Id.* at 9.

waters were a covered situs, the qualification of "used for such activity" would be totally superfluous, since the mere proximity of the pier to navigable waters would be sufficient to raise the prospect of the Act's coverage which the Committee Reports seek to limit.

When the "customarily used" requirement is read to apply to all sites covered by the Act, it is clear from the record that Blundo was not injured at a situs within the statutory definition of situs. The record is unequivocal that the 19th Street pier was never used by ITO or any other "employer" for the purpose of loading or unloading "a vessel." (A. 95). Since the statute requires that a situs be customarily used for loading or unloading "a vessel," rather than for loading and unloading "cargo," the clear implication is that there must be some direct connection between a covered situs and a cargo-carrying ship. The stripping of cargo from containers off-loaded by an unidentified stevedore at an unknown location at some unknown point of time in the past clearly is insufficient to establish this essential relationship with shipboard employment.

Nor can the absence of any loading or unloading activities at the 19th Street pier be overcome by considering the entire ITO "terminal" as a situs customarily used for loading and unloading a vessel. Although the 19th Street and 21st Street piers are located inside the same fence, and although ships are sometimes berthed at 21st Street (A. 64), the difference in the activity carried on at the two pier locations precludes consideration of the 21st Street pier's berthing function as sufficient to establish the 19th Street pier as a site "customarily used" to load and unload a vessel. If the 19th Street pier had been used as a holding station for cargo removed by ITO from ships berthed at 21st Street, the relationship between the two facilities might have been sufficient for "situs" purposes to consider the 19th Street activities as an integral part of the unloading process going on at 21st Street.

However, this was clearly not the case, and the loading and unloading activities of ITO at a different pier cannot supply a sufficient connection between the warehouse-type functions at 19th Street and traditional maritime activity to permit the 19th Street pier on which Blundo was injured to be considered a situs "customarily used" for loading and unloading a vessel.

III. The Department of Labor's expansive interpretation of the Act's coverage has brought about adverse economic effects which Congress could not have intended.

The Department of Labor's expansive interpretation of the 1972 coverage amendments must be evaluated in the context of the legislative history of these amendments, which conveys not the slightest expectation on the part of Congress that the amendments would result in the huge increases in claims, compensation payments, and insurance costs which have in fact occurred. The Committee hearings were devoted primarily to the issues of increased benefits and elimination of third-party suits under the seaworthiness doctrine. In connection with these issues, one of the points most frequently mentioned was the impact which the proposed changes would have on insurance costs incurred by employers of longshoremen. In their recitation of support for the elimination of the seaworthiness doctrine, the Committee Reports specifically indicate that Congress was concerned with the increased cost of compensation insurance which that doctrine had caused:

> Industry witnesses testified that despite the fact that since 1961 injury frequency rates have decreased in the industry, and maximum benefits payable under the Act have remained constant, the cost of compensation insurance for longshoremen has increased substantially because of the increased number of third party cases and legal expenses and higher recoveries in such cases. [*H.R. Rep. No. 1441, supra* at 5; *S. Rep. No. 1125, supra* at 9.]

Testimony regarding soaring insurance costs came also from the Secretary of Labor:

> The courts have thus emasculated the workmen's compensation system in the longshore industry by removing many of the advantages which made it a forward-looking piece of social legislation. *Because of this, it is becoming increasingly difficult for stevedore companies to obtain workmen's compensation insurance. Very few insurance companies are willing to underwrite a risk which is so unpredictable and can go sky high.* [*House Hearings* at 48; emphasis added.]

The records of the hearings reflect that, at least among industry witnesses, the increase in weekly benefits was viewed as a trade-off which was agreed to in exchange for elimination of third-party liability under the seaworthiness doctrine. *See, e.g.*, the statement of Mr. James A. Flynn on behalf of the New York Shipping Association and the National Maritime Compensation Committee:

> *The Cost of Pending Amendments to the Longshore Act*
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> At my request, the National Council on Compensation Insurance analyzed the various bills pending before the Congress to amend the Longshoremen's & Harbor Workers' Compensation Act. Mr. Roy H. Kallop, the Actuary for the Council, advised me of the following results of his cost analysis (Exhibit G):
>
> 1. If S.2318 is enacted *as is*, the federal portion of the insurance rates for classifications involving longshoremen exposure will increase approximately 128%.
> 2. If S.525 is enacted *without* third party relief it would result in an increase in the federal portion of the rates of approximately 53.4%.
> 3. If S.525 is enacted *as is*, including its provision for the elimination of the circular liability cases,

> there would be only a 7.4% increase in the federal portion of the rates, *despite a 70% increase in the maximum weekly benefit level.* [*Longshoremen's and Harborworkers' Compensation Act Amendments of 1972: Hearings on S. 2318, S. 525 and S. 1547 Before the Subcommittee on Labor of the Senate Comm. on Labor and Public Welfare*, 92d Cong., 2d Sess., 38-39 (1972).]

Given this history, it seems highly unlikely that Congress meant to enact coverage provisions which would give rise to soaring insurance costs for stevedore firms, or cause insurance companies to stop writing longshore compensation insurance. Yet that is exactly what has happened, as the Department's recent OWCP Task Force Report has recognized:

> Due to the high benefit levels currently provided under the LHWCA, and uncertainty regarding future liabilities under the Act, a large and growing number of insurance carriers have withdrawn from writing coverage under the Longshore Act. Those who continue to write such coverage quote premium rates which many employers feel are excessive. The result is an increase in the number of applications for self-insurance from marginally profitable companies. *The industry asserts, with supporting evidence, that the costs of obtaining longshore coverage—which have increased so dramatically since the enactment of the 1972 amendments—are becoming prohibitive for small firms.* They are substantially affecting the economic position of larger firms, and are creating the gaps in the availability of coverage.
>
> Longshore coverage is difficult to obtain in some areas of the country, particularly on the west coast. The market for coverage for small employers in the State of Washington is now virtually nonexistent. * * * [81]

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[81] *OWCP Task Force Report* at 76-77; emphasis added.

A major cause of the increased insurance costs has been the Department's liberal extension of federal benefits to workers formerly covered by state workman's compensation laws. The Director of the Office of Workers' Compensation Programs has recently issued figures which indicate that 57% of all injuries now covered under the Act are covered under the 1972 amendments' "Extended Coverage" as that coverage is interpreted by the Department of Labor.[82] In some ports the percentage is even higher. The 1972 amendments' "Extended Coverage" accounts for 65% of all reported injuries in Philadelphia, 79% of all injuries in Baltimore, 73% of all injuries in Norfolk, and 76% of all injuries in Houston.[83]

This dramatic expansion in the number of covered injuries is in large measure a result of the broad interpretation given to the 1972 coverage amendments by the Department of Labor and some Courts of Appeals. The cases which have recently come before this Court on petitions for writs of certiorari give some indication of the extent to which the Department's interpretations of the new coverage amendments have enlarged the scope of activities and situses covered by the Act. The following are additional examples of cases recently decided by the Benefits Review Board or Administrative Law Judges of the Department of Labor:

1. In *Winchester* v. *Texports Stevedore Co.*, 4 BRBS 447 (Sept. 20, 1976), the Board held that a gear room located five blocks from the nearest wharf was a covered "situs." Similar extensions of the "situs" requirement were made in *D'Amato* v. *Ira S. Bushey & Sons*, 4 BRBS 414 (Sept. 17, 1976) (public street and a terminal separated situs of injury from shipyard); *Vitale* v. *Maher Terminals*, 3 BRBS 467 (May 5, 1976) (fence

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[82] Pet. A. 130a.

[83] *Id.*

and public street separated situs of injury from terminal); *Santumo* v. *Sea-Land Service, Inc.*, 3 BRBS 262 (Feb. 27, 1976), *appeal docketed*, No. 76-1521 (3d Cir., filed April 20, 1976) (thoroughfare separated situs of injury from main yard).

2. In *Jones* v. *Newport News Shipbuilding and Drydock Co.*, 4 BRBS 180 (ALJ) (June 23, 1976), the "status" requirement was satisfied with respect to a foundry maintenance employee by evidence that 27.2% of the over-all manhours of the foundry were spent in maritime employment.

3. In *Coppolino* v. *International Terminal Operating Co.*, 1 BRBS 205 (Dec. 2, 1974), an employee injured while loading paper into an IBM machine in an office was held to be engaged in maritime employment. For other clerical functions held to be "maritime employment," *see Luker* v. *Ingalls Shipbuilding*, 3 BRBS 321 (Mar. 19, 1976), *appeal docketed*, No. 76-2157 (5th Cir., filed April 29, 1976) and *Farrell* v. *Maher Terminals, Inc.*, 3 BRBS 42 (Dec. 10, 1975), *appeal docketed*, No. 75-1145 (3d Cir., filed Feb. 6, 1976).

4. Other cases of interest in which coverage was found are *Cappelluti* v. *Sea-Land Service, Inc.*, 1 BRBS 527 (June 10, 1975) (employee "cannibalizing" containers for scrap and spare parts); *DeMayo* v. *Transocean Gateway Corp.*, 4 BRBS 9 (ALJ) (Feb. 25, 1976) (employee injured in a fight); *Lee* v. *Oil Base, Inc.*, 1 BRBS 83 (ALJ) (Mar. 21, 1975) (operator of a factory injured while moving boxes during a flood).

As the foregoing cases indicate, the Department's interpretation of coverage has extended the reach of the Act far beyond what Congress intended when it enacted the 1972 coverage amendments. The direct result has been

a huge increase in compensation payments and insurance costs comparable to if not greater than the increases which Congress sought to curb by eliminating the seaworthiness doctrine. These insurance problems and increased costs have in turn caused or threatened serious economic dislocations no the waterfront of the very sort which Congress attempted to remedy in 1972.[84] This anomalous situation can be corrected only by restoring to the Act the interpretation which Congress had in mind when it enacted the 1972 coverage amendments.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the court below in this case should be reversed.

Respectfully submitted,

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[84] The economic impact of the Department's expansive interpretation is discussed in greater detail in the *amicus curiae* brief of the National Association of Stevedores. We point out this economic impact not as part of a plea based upon the equities of this case, but rather to demonstrate that the Department's interpretation of the 1972 coverage amendments has led to results which Congress could not conceivably have intended.